89-581

Supreme Court, U.S.
FILED
OCT 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-_____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1989

THE CORPORATION OF MERCER UNIVERSITY,
Petitioner,

v.

UNITED STATES GYPSUM CO., NATIONAL GYPSUM CO. AND W.R. GRACE & CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Dated: October 10, 1989

Balmar Legal Publishing Division, Washington, D.C. 20005 (202) 659-3610

92 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the right to reasonable court access to seek recovery for property damage caused by a latent toxic substance whose hazard was known to but concealed by the manufacturer, is "property" protected by the 14th Amendment of the United States Constitution.

2. In considering whether Constitutional due process is provided by a four-year limitations statute that effectively bars asbestos property damage actions, should a federal court balance the State legislature's conclusion that the State's interest lies in allowing such suits, even though the statute expressing that State interest was struck down by the State Supreme Court.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Eleventh Circuit Court of Appeals are listed in the caption of the case in this Court.

RULE 28.1 LISTING

Pursuant to Rule 28.1 of the Rules of the Supreme Court, the petitioner hereby states that it has no parents, non-wholly-owned subsidiaries or affiliates.

RULE 28.4 STATEMENT

28 U.S.C. § 2403(b) may be applicable to this Petition. No court of the United States, as defined by 28 U.S.C. § 451, has certified to the State Attorney General the fact that the constitutionality of a statute of the State of Georgia may be drawn into question.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, the Corporation of Mercer University ("Mercer") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals entered in this proceeding on July 11, 1989.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 877 F.2d 35 (11th Cir. 1989) (App. A). The opinion of the Eleventh Circuit Court of Appeals certifying a question to the Georgia Supreme Court is reported at 832 F.2d 1233 (11th Cir. 1987) (App. B). The opinion of the Georgia Supreme Court on Certification is reported at 258 Ga. 365, 368 S.E.2d 732 (1988) (App. C). The opinion of the Eleventh Circuit certifying to the Georgia Supreme Court in a related case, a second statute of

limitations issue "identical"[1] to the then-remaining issue in this case, is reported at *St. Joseph Hospital v. Celotex Corp.*, 854 F.2d 426 (11th Cir. 1988) (App. D). The opinion of the Georgia Supreme Court as to the second issue is reported at *Celotex Corp. v. St. Joseph Hospital*, 259 Ga. 108, 376 S.E.2d 880 (1989) (App. E).

The opinion of the district court in *Mercer*, denying respondents' motions for judgment notwithstanding the verdict or, alternatively, for a new trial is appended to this Petition (App. F); and the initial and final opinions of the district court interpreting the then-applicable Georgia statute of limitations is also attached (App's. G and H).

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on July 11, 1989 (App. A). This petition is filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND RULINGS INVOLVED

This petition involves two Georgia statutes of limitations and a statute of repose.

Ga. Code Ann. § 9-3-30 (1982), applicable when this case was before the district court, provides: "All actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues." Ga. Code Ann. § 9-3-30 (1982).

Ga. Code Ann. § 51-1-11(c) (1982 & Supp. 1989) (App. I), enacted April 1987, while this case was pending on appeal to the United States Court of Appeals for the Eleventh Circuit, provides:

> (c) The limitation of paragraph (2) of subsection (b) of this Code section regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability, except an action

[1] *See* Corporation of Mercer Univ. v. National Gypsum Co., et al., 877 F.2d at 36.

seeking to recover from a manufacturer for injuries or damages arising out of the negligence of such manufacturer in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property. Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer.

Section 2. All laws and parts of laws in conflict with this Act are repealed.

Ga. Code Ann. § 9-3-30.1 (Supp. 1989) (*See* App. J), promulgated while this case was pending on certified question before the Georgia Supreme Court, provides:

(a)Notwithstanding the provisions of Code Section 9-3-30 or any other law, every action against a manufacturer or supplier of asbestos or material containing asbestos brought by or on behalf of any person or entity, public or private; or brought by or on behalf of this state or any agency, department, political subdivision, authority, board, district, or commission of the state; or brought by or on behalf of any municipality, county, or any state or local school board or local school district to recover for:

(1)Removal of asbestos or materials containing asbestos from any building owned or used by such entity;

(2)Other measures taken to correct or ameliorate any problem related to asbestos in such building;

(3)Reimbursement for such removal, correction, or amelioration related to asbestos in such building; or

(4)Any other claim for damage to real property allowed by law relating to asbestos in such building

which might otherwise be barred prior to July 1, 1990, as a result of expiration of the applicable period of limitation, is revived or extended. Any action thereon shall be commenced no later than July 1, 1990.

(b)The enactment of this Code section shall not be construed to imply that any action against a manufacturer or supplier of asbestos or material containing asbestos is now barred by an existing limitations period.

(c)Nothing in this Code section shall be construed to revive, extend, change, or otherwise affect the applicable period of limitation for persons or entities not set forth and provided for in subsection (a) of this Code section.

(d)Nothing contained in this Code section shall be construed to have any effect on actions for personal injury or any other claim except as specifically provided in this Code section.

STATEMENT OF THE CASE

After fruitless correspondence with manufacturers of asbestos-containing construction products suspected to be installed in its campus buildings, The Corporation of Mercer University ("Mercer") filed suit in district court on April 9, 1985, against such manufacturers, including respondents United States Gypsum Co., National Gypsum Co. and W.R. Grace & Co. Mercer sought, *inter alia*, recovery of damages in tort for injury to its property arising out of defendants' sales to it of construction products containing asbestos. The district court had jurisdiction pursuant to 28 U.S.C. § 1332 (1976). As Mercer obtained formula and sales information in discovery from defendants allowing specific identification of manufacturers' products in the buildings, the case was narrowed before trial to 16 buildings in which products manufactured by five defendants were installed between 1956 and 1972.

Defendants moved for summary judgment, asserting *inter alia*, that Mercer's claims were barred by Georgia's four-year statute of limitations. *See* Ga. Code Ann. § 9-3-30 (1982). The district court initially held that Georgia would apply its discovery rule to this toxic tort property damage action, and that the limitation statute therefore began to run when "Mercer knew or reasonably should have known that removal of the defendants' products was necessary to alleviate the hazard." *Corporation of*

Mercer University v. National Gypsum Co., Civil Action No. 85-126-3-MAC, slip op. at 9 (M.D. Ga. March 9, 1986) (App. G at 45a). After a bifurcated statute of limitations trial with jury responses to four special interrogatories, the district court modified its prior interpretation of Georgia's discovery rule and held that the four-year statute began to run when Mercer discovered, or reasonably should have discovered, that the use of asbestos-containing materials in buildings was allegedly hazardous and that such materials were present in its buildings. *Corporation of Mercer University v. National Gypsum Co.*, Civil Action No. 85-126-3-MAC, slip op. at 5 (M.D. Ga. March 26, 1986) (App. H at 58a) On that basis, the court dismissed as untimely Mercer's claims as to all but four buildings, and dismissed United States Gypsum Company from the case because none of the remaining buildings were alleged to contain its products (App. H at 63a).[2]

At trial on the merits against the respondents W.R. Grace & Co. and National Gypsum Company, the jury awarded Mercer compensatory and punitive damages totalling $2,399,701.18.

National Gypsum and W.R. Grace & Co. appealed to the Court of Appeals for the Eleventh Circuit and Mercer cross-appealed the district court's ruling that the statute of limitations barred claims relating to the 12 buildings removed from the case before the liability trial phase. Mercer also appealed the district court's order dismissing United States Gypsum Company after the statute of limitations phase. The two appeals were consolidated.

On November 23, 1987, after argument and upon consideration of the record, the Eleventh Circuit certified to the Supreme Court of Georgia pursuant to Ga. Const. Art. VI, § 6, para. 4, Ga. Code Ann. § 15-2-9, and Ga. Sup. Ct. R. 37, the following question:

> Whether the discovery rule is applicable to property damage cases where there is no applicable statute of repose but there are knowledge and concealment of hazardous defects?

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[2] Mercer dismissed its claims as to one of the remaining four buildings after agreeing to the dismissal of the two manufacturers (not involved here), whose products were alleged to be in that building.

Corporation of Mercer University v. National Gypsum Co., 832 F.2d at 1236 (App. B).

The Court of Appeals' opinion on certification referenced the Georgia legislature's 1987 adoption of an amendment to Ga. Code Ann. § 51-1-11, a ten-year statute of repose previously applicable only to statutory product liability actions. *Id.* at 1236, n.3. The 1987 amendment extended Georgia's statute of repose to actions claiming negligence of a manufacturer "*except in actions seeking to recover from a manufacturer for injuries or damages arising out of the negligence of such manufacture in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property.*" Ga. Code Ann. § 51-1-11(c) (1982 & Supp. 1989) (App. I). The Appeals Court noted that Mercer contends its action involves a product "which causes a disease" and arises out of conduct "which manifests a willful, reckless, or wanton disregard for life or property." *Id.*

While the certified question was pending before the Supreme Court of Georgia, the Georgia legislature passed Senate Bill No. 649 ("SUB") amending Ga. Code Ann. § 9-3-30 by inserting a new section, § 9-3-30.1 (Supp. 1988), reviving or extending until July 1, 1990 asbestos property damage actions "which might otherwise be barred." (App. J) The amended statute provided: "The enactment of this code section shall not be construed to imply that any action against a manufacturer or supplier of asbestos or material containing asbestos is now barred by an existing limitations period." § 9-3-30.1(b). This bill became law on April 14, 1988. The Supreme Court of Georgia, despite notice of the statute, did not consider the effect of the statute on Mercer's claims.

On June 9, 1988, the Supreme Court of Georgia responded to the certified question in *Mercer*. The Court held that the discovery rule in Georgia is confined to personal injury cases, despite the fact that the accrual language in the Georgia personal injury and property limitations statutes is identical,[3] and despite

[3] *See* Ga. Code Ann. § 9-3-33 (1982)("two years after the right of action accrues"for injuries to person); Ga. Code Ann. § 9-3-30 (1982) ("four years after the right of action accrues"for injury to real property). *See also* Lumbermen's Mut. Casualty Co. v. Patillo Constr. Co., 254 Ga. 461, 330 S.E.2d 344, 346 (1985)

the countervailing rationale of its recent decision in *Lumbermen's Mutual Casualty Co.*.[4] *See, Corporation of Mercer University v. National Gypsum Co.*, 258 Ga. 365, 368 S.E.2d 732 (1988). The Georgia Court therefore concluded that a cause of action under Ga. Code Ann. § 9-3-30 must be brought within four years of substantial completion of the damaged building or property. *Id.*[5]

The case of *St. Joseph Hospital v. Celotex Corp.*, also pending before the Eleventh Circuit at that time, "presented the identical [remaining] issue of whether § 9-3-30.1 applies to cases pending at the time of its enactment." *Corporation of Mercer University v. National Gypsum Co.*, 877 F.2d 35, 36 (11th Cir. 1989). The Eleventh Circuit therefore certified to the Supreme Court of Georgia in the *St. Joseph* action, the question:

> Whether Ga. Code Ann. § 9-3-30.1 applies to cases pending at the time of the statute's enactment so as to prevent these claims from otherwise being barred by an applicable period of limitation?

St. Joseph Hospital v. Celotex Corp., 854 F.2d 426, 429 (11th Cir. 1988).

In response, the Georgia Supreme Court answered that Ga. Code Ann. § 9-3-30.1 was unconstitutional under the Georgia Constitutional provision prohibiting special legislation. *Celotex Corp. v. St. Joseph Hospital*, 259 Ga. 108, 376 S.E.2d 880 (1989).[6]

After the Supreme Court of Georgia decision in *St. Joseph*, both Mercer and St. Joseph Hospital moved the Eleventh Circuit Court of Appeals for remand to the district court for further

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(logic cannot justify construing the same words differently in the two statutes of limitations).

[4] Lumbermen's Mut. Casualty Co. v. Patillo Constr. Co., 254 Ga. 461, 330 S.E.2d 344 (1985).

[5] Mercer filed a motion for reconsideration in the Supreme Court of Georgia, arguing that § 9-3-30.1 should apply to its suits. The Court denied this motion on July 1, 1988.

[6] Thereafter, the Eleventh Circuit reversed and remanded the *St. Joseph* district court decision for entry of judgment for defendants. St. Joseph Hospital v. Celotex Corp., 874 F.2d 764 (11th Cir. 1989). Plaintiff-Appellee St. Joseph Hospital's suggestion for rehearing *en banc* is presently pending in that action.

proceedings or for a schedule to brief the constitutional due process issue raised by the fact, as argued by these plaintiffs, that injury could not even occur and the cause of action did not accrue within four years of construction. This motion was denied.

On July 11, 1989, on the basis of the two responses to certified question by the Supreme Court of Georgia, the Eleventh Circuit reversed and remanded for dismissal Mercer's claims against W.R. Grace & Co. and National Gypsum Co. The appeals court affirmed the district court's dismissal of United Stated Gypsum Co. *Corporation of Mercer University v. National Gypsum Co.*, 877 F.2d 35 (11th Cir. 1989).

REASONS FOR ALLOWING THE WRIT

1. The right to reasonable court access for latent toxic tort actions should be specifically recognized as a property interest protected under the due process clause of the 14th Amendment.

Asbestos construction materials "injure" a building by invisibly, sporadically and, either over a period of many years or in brief intensive bursts, contaminating the building air, surfaces and contents so that humans using the building are either injured or threatened with personal injury. Asbestos-containing materials were sold for decades for installation in buildings open to the public, without notice to purchasers of their asbestos content or warning of the asbestos hazard known by the products' manufacturers. Mercer University was one such purchaser. Ample evidence was presented at trial, cited by the district court in its order denying new trial,[7] and referred to by the Court of Appeals in its certified question to the Georgia Supreme Court that, many years before their sales to Mercer, the respondents knew and actively concealed the hazards presented by the asbestos in their products. *Corporation of Mercer University v. National Gypsum Co.*, 832 F.2d 1223, 1236 (11th Cir. 1987).

The district court correctly characterized Mercer's cause of action as

[7] Corporation of Mercer Univ. v. National Gypsum Co., No. 85-126-3-MAC, slip op. at 6 (M.D. Ga. August 26, 1986) (App. F).

> [a] hybrid personal injury/property damage case. Asbestos has no effect on the structure of a building; the only problem with its use is the effect it may have on the people who use the building.

Corporation of Mercer University v. National Gypsum Co., Civil Action No. 85-126-3-MAC, slip op. at 7 (M.D. Ga. March 9, 1986) (App. G at 44a). In this, Mercer is like other property owners and personal injury plaintiffs bringing claims for injury insidiously imposed by toxic substances whose manufacturers either knew or should have known of their products' hazards, but concealed that information until the injuries themselves became so numerous that the cause came to light. *See* Note, *The Discovery Rule: Fairness in Toxic Tort Statutes of Limitations*, 33 Clev. St. L. Rev. 491 (1985); *see also* Note, *Statutes of Limitations and the Discovery Rule in Latent Injury claims: An Exception or the Law?*, 43 U. Pitt. L. Rev. 501, 522 n. 107 (1982).

A cause of action, whether common law or statutory, is a species of property protected by the 14th Amendment's due process clause. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311-315 (1950) (cause of action against fund trustees is property protected by due process clause); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-429 (1982) (an employee's right to use state adjudicatory procedures in a discrimination action is a protected property interest); *Martinez v. California*, 444 U.S. 277, 281-82, *reh'g denied*, 445 U.S. 920 (1980) ("arguably"a state tort claim is a species of property protected by the due process clause).

The right to reasonable court access to protect or assert a cause of action involving fundamental interests can, in itself, be a Constitutional due process right. In *Boddie v. Connecticut*, 401 U.S. 371 (1970), this Court held that the right of court access for the adjustment of a "fundamental human relationship" (the dissolution of a marriage) is a protected property interest where resort to the judicial system is the exclusive means of dispute resolution. *See also Logan v. Zimmerman Brush Company*, 455 U.S. 422.

Whether brought in the context of a property damage or personal injury suit, the interests protected in asbestos toxic tort cases are based upon the fundamental interests in personal security and bodily integrity recognized in *Ingraham v. Wright*, 430 U.S. 651, 673 and nn. 41-42 (1977). An asbestos property damage suit combines the public's fundamental interests in personal security and bodily integrity with that of a property owner to hold his property free from unconsented contamination by a toxic substance. *See, e.g., United States v. Causby*, 328 U.S. 256, 266-67 (1945) (land owner has Fifth Amendment property right in enjoyment and beneficial use of land).

The only means to redress the injury to fundamental public safety and real property interests rendered by unconsented asbestos contamination is through the courts. While a debtor and creditor may be capable of resolving their dispute without access to bankruptcy court, *see United States v. Kras*, 409 U.S. 434, 445 (1973), it would be a cynical fiction to assert that, absent access to the courts, a toxic tort victim such as Mercer could reach a private settlement with an asbestos manufacturer. Unless a manufacturer is confronted with liability, it has no incentive even to warn of injuries that otherwise will be barred by time, much less to voluntarily pay the substantial sums necessary to remedy a hazard that it knew and concealed for over a quarter of a century.[8]

State statutes of limitation govern an asbestos property damage claimant's access to both state and federal courts.[9] States, of course, may establish "reasonable procedural requirements for triggering the right to an adjudication," including statutes of limitations. *Logan v. Zimmerman Brush Co.*, 455 U.S. at 437. When the State statute restricts access to the only available mechanism for protection of fundamental interests, the issue becomes whether

[8] *See*, The Supreme Court, 1970 Term, 85 Harv. L. Rev. 104, 108 (1971); Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 Harv. L. Rev. 1683, 1694 (1983) (Although it is theoretically possible for a toxic tort victim to reach a private financial settlement with the tortfeasor, the tortfeasor will in reality have little incentive to agree to a settlement if the victim's lack of access to the judicial process prevents him from bringing a tort suit or enforcing the agreement); Note, *The Discovery Rule: Fairness in Toxic Tort Statutes of Limitations*, 33 Clev. St. L. Rev. 491 (1985).

[9] Erie Ry. v. Tompkins, 304 U.S. 64 (1938).

that restriction is "reasonable." For that determination, *Logan* indicates that a federal court must apply a balancing test. *Id.*

> 2. Before applying the four-year Georgia limitation statute to effectively bar all asbestos property damage actions, a federal court should balance the actual State interest expressed by the Georgia legislature, in *allowing* such suits rather than weighing only the general hypothetical State interests in upholding limitation statutes.

Confronted with significant restriction of court access for protection of a fundamental interest, this Court has indicated a balancing test should be used to determine whether that restriction is reasonable. The State may not deprive someone of court access in such circumstances "unless the balance of state and private interests favors the government scheme." *Logan v. Zimmerman Brush Company*, 455 U.S. at 430 n. 5. In *Logan*, this court balanced factors such as "the importance of the private interest and the length or finality of the deprivation [of access] ...; the likelihood of governmental error, ...; and the magnitude of the governmental interests involved ...." *Id.* at 434 (citations omitted).

The Court of Appeals in this case did not allow Mercer to pursue briefing on the issue of whether the effect of the two Georgia Supreme Court decisions on certification deprived Mercer of due process in effectively cutting off court access before injury.[10] Doubtless, in so doing, the Court relied in part upon the reasoning of several recent appellate decisions purporting to balance the interests of plaintiffs injured by asbestos and upholding the states' asserted interest in cutting off "stale" suits. *See, e.g., Braswell v. Fintkote Mines, Ltd.*, 723 F.2d 527 (7th Cir. 1983), *reh'g denied, cert. denied*, 467 U.S. 1231 (1984) (two-year statute of

[10] Mercer raised this issue at the first opportunity, since the Supreme Court of Georgia's decision on certification was not foreshadowed by its most recent opinion applying a discovery rule to toll the four-year property damage limitations statute, *see* Lumbermen's Mut. Casualty Co. v. Patillo Constr. Co., 330 S.E.2d (1985). Even upon receiving the Georgia Supreme Court's decision in *Mercer* reversing its decision in *Lumbermen's*, it was not until the Georgia Supreme Court also nullified the asbestos property damage revival statute, in Celotex Corp. v. St. Joseph Hosp., 376 S.E.2d at 880, that Mercer's court access was retroactively barred.

limitations accruing at time of wrongful act); *See also Pitts v. Unarco Industries, Inc.*, 712 F.2d 276 (7th Cir. 1983), *cert. denied* 464 U.S. 1003 (1983) (10-year statute of repose barred suit before plaintiff knew of injury); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134 (6th Cir. 1983) (ten-years-from-delivery statute of limitations applicable to DES although legislature exempted asbestos).

Those cases, however, as well as this court's recent decision in *United States v. Kubrick*, 444 U.S. 111 (1979), consider and uphold statutes that were at least arguably supported by the responsible legislative body, with respect to the interests affected in the factual context considered by the court.[11] That is not the situation here. As this court's decisions underscore, due process, unlike some legal rules, is not a technical concept with a fixed content unrelated to the facts and circumstances of the individual case. *See, e.g., Arnett v. Kennedy*, 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974); *Fuentes v. Shevin*, 407 U.S. 67, *reh'g denied*, 409 U.S. 902 (1972). The courts have been too willing, however, in considering statutes that deprive an injured party of any court access, to rely upon the same lists of hypothetical interests promoted by statutes of limitation, generally. In the instant case, the error of such undifferentiated presumptions becomes apparent.

The rationale advanced by the *Braswell* court is typical. The court in *Braswell* largely relied upon reasoning and policies articulated in *United States v. Kubrick*.[12] *See Braswell*, 723 F.2d at

[11] As succinctly analyzed in Goad v. Celotex Corp., 831 F.2d 508 (4th Cir. 1987), the above decisions also involve different state interests to the extent they concern statutes of repose, rather than statutes of limitations. (*See, e.g., Pitts*, 712 F.2d at 276.) Statutes of repose purport to dissolve rights before they accrue and are meant to be "a substantive definition of rights as distinguished from a procedural limitation on remedy..." *Id.* at 511 (citation omitted). *See also* Bowman v. Niagara Machine and Tool Works, Inc., 832 F.2d 1052, 1054-55 (7th Cir. 1987). The statute of limitations at issue here, however, goes only to restrict a remedy for Mercer's right of action. As such, it is a procedural instrument of public policy. *See* Campbell v. Holt, 115 U.S. 620 (1885); Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945). The statute must provide constitutional due process when the underlying interests are fundamental.

[12] The appellate court stated erroneously that the *constitutionality* of a two-year statute of limitations was upheld in *Kubrick*. *Kubrick* actually involved judicial construction of a federal statute important to the administration of the federal

529-530. These policies include:

> 1. "pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time" and "the right to be free of stale claims";
>
> 2. While "affording plaintiffs what the legislature deems a reasonable time to present their claims, [statutes of limitations] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."; and
>
> 3. The statute represents "the balance struck by [the legislative body].... and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims."

Id. at 529-530 (citations omitted).

Toxic tort plaintiffs many times have argued the countervailing interests to the first two hypothetical State interests, above, which are generally attributed by the courts to the adopting legislative body, *i.e.*,

1. The manufacturer was on notice at the time of sale that it had placed a hidden hazard within its product and consciously sought to withhold that knowledge from its purchasers. Fairness cannot hold a plaintiff to the standard of having to place a defendant on notice of an injury of which plaintiff did not, and could not know, and which had not even yet occurred; but which the defendant manufacturer could more clearly have foreseen;[13]

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government, not a balancing or analysis for purposes of constitutional review. *See* United States v. Kubrick, 444 U.S. at 116-117.

[13] *See, e.g.*, Note, *The Discovery Rule: Fairness in Toxic Tort Statutes of Limitations*, 33 Clev. St. L. Rev. 491, 495 (1985).

2. In circumstances of toxic tort, the search for truth is often aided by the passage of time during which injuries have come to light and have been analyzed in sufficient numbers for causation to be assigned. Evidence in such cases often is comprised of the manufacturers' own documents once they are forced from the manufacturer's vaults in court-directed discovery;[14]

Most significant, however, under the facts of this case, is the third rationale referenced in *Braswell*: federal courts should give some deference to the balancing of interests struck by the State legislative body. Twice during the pendency of this suit, the Georgia legislature unequivocally evidenced its intent that court access should not be barred for asbestos property damage actions. Even if the legislature did not succeed in expressing its policies in a statute acceptable to the Georgia Supreme Court, nevertheless the legislature's position on the balancing of fundamental interests is clear.

First, in adopting a ten-year statute of repose applicable to actions brought in negligence against manufacturers, the Georgia legislature specifically excluded from the ten-year bar actions brought for products that cause disease or the sale of which evidences the kind of callous disregard that earned the respondents punitive damages in this case. *See* Ga. Code Ann. § 51-1-11(c) (1982 & Supp. 1989). As the Georgia Supreme Court itself recognized in its earlier *Lumbermen's* decision,[15] a statute of repose makes no sense unless the legislature considers that the four-year statute of limitation accrues upon some action other than the initial sale. The Georgia Legislature in 1987 therefore balanced the interests of the State, injured parties and potential defendants with regard to latent toxic torts, such as asbestos, and, without distinguishing between personal injury and property damage, decided that even the ten-year bar of a statute of repose was inappropriate to foreclose court access in such circumstances.

The Georgia Supreme Court ignored Ga. Code Ann. § 51-1-11(c) in responding to the two questions certified by the Eleventh

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[14] *Id.*, *see also* Raymond v. Eli Lilly & Co., 371 A.2d 170, 176 (N.H. 1977).

[15] Lumbermen's Mut. Casualty Co. v. Patillo Constr. Co., 254 Ga. 461, 330 S.E.2d 344, 346 (1985).

Circuit. Its significance is urged here, not on the basis that the statute was in existence at the time of Mercer's injury or even at the time of the initiation of Mercer's suit, but as a statement of the actual result reached by the Georgia legislative body when it balanced State and fundamental citizens' interests with respect to toxic tort claims.

Added to this, of course, is the Georgia legislature's specific adoption in 1988 of legislation designed to revive and extend any asbestos property damage cause of action, if such could be deemed to have been barred by the general statute of limitations. *See* Ga. Code Ann. § 9-3-30.1 (Supp. 1989).

In deciding upon the due process constitutionality of Ga. Code Ann. § 9-3-30, the Eleventh Circuit should have taken into account that Mercer's interests are fundamental interests protected by due process under the Fourteenth Amendment of the United States Constitution, and weighed the fact that the Georgia legislature agrees with Mercer that such suits should not be barred by a four-year from construction statute of limitation.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the writ of certiorari be allowed.

Respectfully submitted,

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Appendix A

United States Court Of Appeals,

Eleventh Circuit
Nos. 86-8416, 86-8693.

The CORPORATION OF MERCER UNIVERSITY
Plaintiff-Appellant,

v.

NATIONAL GYPSUM COMPANY, a Delaware Corp., et al.,
Defendants-Appellees.

The CORPORATION OF MERCER UNIVERSITY,
Plaintiff-Appellee, Cross-Appellant,

v.

NATIONAL GYPSUM COMPANY, and W.R. Grace & Co.,
Defendants-Appellants, Cross-Appellees.

July 11, 1989.

In suits against manufacturers of construction products to recover damages in tort for injury to property arising out of sale of products containing asbestos, the United States District Court for the Middle District of Georgia, No. C85-126-3-MAC, Anthony A. Alaimo, Chief Judge, held that under Georgia's discovery rule, statute of limitations did not begin to run until plaintiff knew or reasonably should have known that asbestos material was hazard requiring removal. The Court of Appeals, 832 F.2d 1233, certified question to the Georgia Supreme Court which held, per Smith J., 258 Ga. 365,368 S.E.2d 732, that discovery rule applied only to cases involving bodily injury. The Court of Appeals held that because discovery rule and Georgia statute extending limitations period for initiating suits to recover for property damage against suppliers or manufacturers of material containing asbestos were

inapplicable, four-year Georgia statute of limitations governed and suits were untimely.

Affirmed in part and reversed and remanded in part.

Limitation of Actions

Under Georgia law, because discovery rule applied only to cases involving bodily injury and statute extending limitations period for initiating suits to recover for property damage against suppliers or manufacturers of material containing asbestos was inapplicable to suits pending at time of statute's enactment, suits against manufacturers of asbestos-containing construction products for property damage only were governed by four-year statute of limitations and were thus untimely. O.C.G.A. §§9-3-30, 9-3-30.1.

Darci L. Rock, Bracewell & Patterson, William A. Anderson, II, Mary Caroline Parker, Luis M. Nido, Washington D.C., Martin W. Dies, Jr., Law Offices of Martin Dies, Orange, Tex., Charles M. Stapleton , Martin, Snow, Grant & Napier, Cubbedge Snow, Jr., Macon, Ga., for Corporation of Mercer University.

Richard M. Bernstein, Lawrence T. Hoyle, Morris & Kerr, Philadelphia, Pa.,Shepard M. Remis, Goodwin, Procter & Hoar, Sandra Sue McQuay, Boston, Mass., Thomas B. Kenworthy, Morgan, Lewis & Bockius, Philadelphia, Pa., A. Stephens Clay, Mara McRae, Kilpatrick & Cody, Atlanta, Ga., for National Gypsum Co., et all.

Shepard M. Remis, Goodwin, Proctor & Hoar, Kenneth A. Cohen, Boston, Mass., for W.R. Grace & Co.

Appeals from the United States District Court for the Middle District of Georgia.

Before HIll and VANCE, Circuit Judges, and SPELLMAN*, District Judge.

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* Honorable Eugene P. Spellman, U.S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

Mercer University filed actions in district court on April 9, 1985, against several manufacturers of construction products including defendants United States Gypsum, National Gypsum and W.R. Grace & Co. Mercer sought to recover damages in tort for injury to its property arising out of defendant's sale to it of products containing asbestos. Mercer alleged that these products were installed in its buildings between 1906 and 1972.

Defendants moved for summary judgment, asserting that the claims were barred by the four-year statute of limitations. *See* Ga.Code Ann. §9-3-30 (1982). The district court held that under Georgia's discovery rule the statute of limitations did not begin to run Mercer knew or reasonably should have known that the asbestos material was a hazard requiring removal. Under this rule, the court held that the statute of limitations had expired on twelve of the sixteen buildings named in the suit. The district court then dismissed United States Gypsum from the case because it found that none of the remaining four buildings contained its products. After a bifurcated trial the jury awarded Mercer compensatory and punitive damages against National Gypsum and W.R. Grace & Co. National Gypsum and W.R. Grace & Co. appealed and Mercer cross-appealed the court's ruling that the statute of limitations barred claims relating to the remaining twelve buildings. This case was consolidated with Mercer's appeal from the dismissal of United States Gypsum.

Because the scope of Georgia's discovery rule presented important issues of Georgia law for which there was no clear precedent we certified to the Georgia Supreme Court the question of whether the discovery rule applies to cases involving property damage. In response, the Georgia Supreme Court answered that the discovery rule applies to only cases involving bodily injury. *Mercer Univ. v. National Gypsum Co.,* 258 Ga. 365, 368 S.E.2d 732 (1988).

While this case was pending before the Georgia Supreme Court, the Georgia legislature enacted a statute that extended the statute of limitations for initiating suits to recover for property against suppliers or manufacturers of material containing asbestos.

Ga.Code Ann. §9-3-30.1 (1982) (Effective Apr. 14, 1988). The Georgia Supreme Court, however, did not consider the effect of this statute on Mercer's claims.[1]

The case of *St. Joseph Hospital v. Celotex Corp.* presented the identical issue of whether section 9-3-30.1 applies to cases pending at the time of its enactment. Because of the importance of this issue of Georgia law we certified this question to the Georgia Supreme Court. *St. Joseph Hospital v. Celotex Corp.*, 854 F.2d 426 (11th Cir.1988). In response, the Georgia Supreme court has answered that section 9-3-30.1 is unconstitutional. *St. Joseph Hospital v. Celotex Corp.*, 259 Ga. 108, 376 S.E.2d 880 (1989). Therefore Mercer's actions are governed by the four-year statute of limitations of Ga.Code Ann. §9-3-30. Because Mercer's suits were not commenced. within this period its claims relating to all of the buildings named in its suit are barred.

Accordingly, in case number 86-8416 [the appeal; from the dismissal as to United State Gypsum Company] the judgement of the district court is AFFIRMED. In case number 86-8693 judgement of the district court for the plaintiff [based on its ruling that claims relating to four buildings named in the suit are not barred by the statute of limitations] is REVERSED and the case REMANDED for dismissal of all of Mercer's claims; on Mercer's cross-appeal the judgement of the district court [based on its ruling that plaintiff's claims relating to twelve buildings named in the suit are barred by the statute of limitations] is AFFIRMED.

REVERSED and REMANDED IN PART, AFFIRMED IN PART.

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[1] On June 20, 1988, Mercer filed a motion for reconsideration in the Supreme Court of Georgia, arguing that section 9-3-30.1 should apply to its suit. The court denied this motion on July 1, 1988.

Appendix B.

United States Court of Appeals,

Eleventh Circuit
Nos. 86-8416, 86-8693.

The CORPORATION OF MERCER UNIVERSITY
Plaintiff-Appellant

v.

NATIONAL GYPSUM CO., a Delaware Corp., et al.,
Defendants-Appellees

The CORPORATION OF MERCER UNIVERSITY,
Plaintiff-Appellee, Cross-Appellant,

v.

NATIONAL GYPSUM COMPANY, and
W.R. Grace & Co.,
Defendants -Appellants, Cross-Appellant.

November 23, 1987.

Darci L. Rock, Bracewell & Patterson, William A. Anderson, II, Mary Caroline Parker, Lois M. Nido, Washington, D.C., Martin W. Dies, Jr., Law Offices of Martin Dies, Orange, Tex., Charles M. Stapleton, Martin, Snow, Grant & Napier, Cubbedge Snow, Hr., Macon, Ga., for plaintiff-appellant.

Alfred B. Adams, III, Wildman, Harrold, Allen, Dixon & Branch, Daniel J. Webb, Atlanta, Ga., for amicus curiae Presbyterian Center, Inc.

Richard M. Bernstein, Hoyle, Morris & Kerr, Lawrence T. Hoyle, Philadelphia, Pa., Shepard M. Remis, Goodwin, Procter & Hoar, Sandra Sue McQuay, Boston, Mass., Thomas B. Kenworthy,

Morgan, Lewis & Bockius, Philadelphia, Pa., A. Stephens Clay, Mara McRae, Atlanta, Ga., for defendants-appellees.

Shepard M. Remis, Goodwin, Proctor & Hoar, Kenneth A. Cohen, Boston, Mass., for W. R. Grace & Co.

Appeals from the United States District Court for the Middle District of Georgia; Anthony A. Alaimo, Chief Judge.

Before HILL and VANCE, Circuit Judges, and SPELLMAN,* District Judge.

PER CURIAM:

This appeal presents important issues of Georgia Law for which there is unclear precedent in the decisions of the courts of Georgia. Because there are a significant number of similar cases in Georgia involving very substantial amounts of money, we believe that the issue is appropriate for resolution by the Supreme Court of Georgia. We therefore certify the question to the Supreme Court of Georgia pursuant to Ga. Const. art. 6, § 6, para. 4, Ga.Code Ann. § 15-2-9, and Rule 37 of the Georgia Supreme Court.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF GEORGIA PURSUANT TO ARTICLE VI SECTION VI PARAGRAPH IV OF THE GEORGIA CONSTITUTION.
TO THE SUPREME COURT OF GEORGIA AND THE HONORABLE JUSTICES OF THAT COURT:

I. Style of the Cases

The style of the cases in which this certificate is made is as follows: The Corporation of Mercer University, Plaintiff-Appellant, versus United States Gypsum Company, Defendant-Appellee, Case No. 86-8416, filed in the United States Court of Appeals for the Eleventh Circuit, on appeal from the United States District Court for the Middle District of Georgia; The Corporation of

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* Honorable Eugene P. Spellman, U.S. District Judge for the Southern District of Florida, sitting by designation.

Mercer University, Plaintiff-Appellee, cross-appellant, versus National Gypsum Company and W.R. Grace & Co., Defendants-Appellants, Cross Appellees, Case No. 86-8693, filed in the United States District Court for the Middle District of Georgia.

II. Statement of the Facts

On April 9, 1985, Mercer University filed actions in federal district court against several manufacturers of asbestos-containing construction products. Among these manufacturing companies were defendants United States Gypsum, National Gypsum, and W.R. Grace & Co. The lawsuits were brought to recover damages in tort for injury to property arising out of the defendants' sale to Mercer University of asbestos products. Mercer alleged that these products were installed in buildings constructed or renovated between 1906 and 1972 on its Atlanta and Macon campuses.

Defendants moved for summary judgment on the ground that the plaintiff's claims were barred but the statute of limitations. The district court, applying Georgia's discovery rule, held that the four-year statute of limitations did not begin to run until Mercer knew or reasonable should have known that the removal of defendants' products was necessary to eliminate the hazard associated with the asbestos. It therefore denied the summary judgment motions. After a bifurcated trial, the jury awarded Mercer compensatory damages of $114,800.18 against National Gypsum, $284,901.00 against W.R. Grace & Co., and punitive damaged of $1,000,000 against both companies. The subsequent appeals by National Gypsum and W.R. Grace & Co., and Mercer University's cross-appeal, were consolidated with Mercer's earlier appeal of the district court's dismissal of United States Gypsum.

III. Reasons For Certification

This case involves the application of Georgia's "discovery rule," which provides that a cause of action in tort will not accrue until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, that he has been injured and that the injury may have been caused by the defendant. *King v. Seitzingers, Inc.*, 160 Ga.App. 318, 287 S.E.2d 252, 254 (1981). We understand it to be well established in Georgia that the discovery rule applies to personal injury cases. *See Everhart v. Rich's, Inc.*,

229 Ga. 798, 194 S.E.2d 425, 428-29 (1972); *Anderson v. Sybron Corp.*, 165 Ga..App. 566, 299 S.E.2d at 254. To what extent the discovery rule applies to property damage cases is unclear.

In *Lumbermen's Mut. Cas. Co. v. Pattillo Constr. Co., Inc.*, 254 Ga. 461, 330 S.E.2d 344 (1985), the Supreme Court of Georgia directly confronted the issue of whether the discovery rule applicable in personal injury actions is applicable in property damage cases. *Id.* Three of seven justices voted to extend the discovery rule to property damage cases, finding support in Ga.Code Ann. § 9-3-51(a), an eight year stature of repose for actions to recover damages for injury to property. Three justices voted to confine the discovery rule "to cases of bodily injury which develop only over an extended period of time." 330 S.E.2d at 348 (Weltner, J., dissenting).

Justice Bell, concurring specially, provided the fourth and deciding vote for applying the discovery rule to property damage cases, but only where there is an applicable stature of repose. In cases where there is no statute of repose, he indicated he would not adopt the discovery rule. *Id.* (Bell, J., concurring).[1]

In this case, there is no applicable stature of repose.[2] Counting *Lumbermen's* votes, the Georgia discovery rule would appear to be inapplicable to Mercer's action for damages to its property.

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[1] In Shaw v. Peterson, 180 Ga.App. 823. 350 S.E.2d 831 (1986), the court held that the discovery rule applied to ann action brought by a homeowner against a contractor for damage resulting from ja construction defect. Id. at 832. The court was unclear, however, as to whether the existence of the statute of repose was a prerequisite to the application of the discovery rule.

[2] Ga.Code Ann. § 9-3-51(a), the statute of repose in Lumbermen's, applies to the defendants in this case are manufacturers of products in the buildings. The statuteprovides:

9-3-51. Limitations on recovery for deficiency in planning, or constructing improvment to realty or for resulting injuries to property or person.

(a) No action to recover damages:

(1) For any deficiency in the survey or plat, planning, design , specificaions supervision or observation of construction, or construction of an improvement to real;

(2) For injury to property, real or personal, arising out of any such deficiency; or

Mercer contends, however, that this result should not prevail in all property damage situations. Mercer argues that where, as in this case, there are allegations that the defendants have knowledge of a dangerous defect that they are withholding, the discovery rule still applies. In essence, the plaintiff reads *Lumbermen's* to hold that the discovery rule applies to property damage cases where there exists an applicable statute of repose *or* where the defendant knowingly conceals the existence of a continuing hazardous condition.

Mercer finds support for its position in the language of *U-Haul Co. of Western Georgia v. Abreu & Robeson, Inc.*, 247 Ga. 565, 277 S.E.2d 497 (1981). In that case, the Georgia Supreme Court held that a cause of action against architects for negligent design was barred by the four year statute of limitations for damages to personal property. The court added, however, that statutes of limitation my be tolled in some situations.

> Even though the cause of action for damage to the building accrues at the time of construction, a cause of action for damage to personal property or for personal injury proximately resulting from defective construction does not accrue until these injuries occur. This is a different proposition from the theory that a statute of limitation may be tolled by some other event once the cause of action has arisen. There is no allegation of fraud, *nor does the complaint allege that the architects had knowledge of dangerous defects which they were withholding.*

Id. 277 S.E.2d at 499 (emphasis added). Mercer contends that because the defendants in this case had knowledge of the

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(3) For injury to the person or for wrongful death arising out of any such deficiency shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of such an improvement more than eight years after substantial completion of such an improvement.

[3] Plaintiff also cites the 1987 amendment to Ga.Code Ann. § 51-1-11, a ten year statute of repose for product liability actions. The new amendment provides:

> The limitation ... regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the

hazards associated with the asbestos in its buildings, and withheld this knowledge from Mercer, the statute of limitations was tolled.[3]

Faced with this unsettled issue of Georgia law, we certify the question of whether the *Lumbermen's* ruling on the discovery rule in property cases applies to all property damage situations, or is limited to where there are no allegations of willful concealment of hazardous conditions.

IV. Question to be Certified to the Georgia Supreme Court

Whether the discovery rule is applicable to property damage cases where there is no applicable statute of repose but there are knowledge and concealment of hazardous defects?

Implicit in the statement of the question is the assumption that the asserted tort claim for negligent injury to property exists under Georgia law. If the Georgia Supreme Court concludes that this assumption is not correct, then the question certified will be rendered moot.

Our statement of the question is not designed to limit the inquiry of the Georgia Supreme Court.

[T]he particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts.

Wood v. New York Life Ins. Co., 758 F.2d 1459, 1462 (11th Cir.1985), (*quoting Martinez v. Rodriquez*, 394 F.2d 156, 159 n. 6 (5th Cir.1968)).

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commencement of an action claiming negligence of a manufacture as the basis of liability, except an action seeking to recover from a manufacturerfor injuries or damages arising out of the negligence of such manufacturer in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property. Ga.Code Ann. § 51-1-11(c) (emphasis added). Plaintiff alleges tha this case involves products which cause disease, as well as conduct manifesting a willful, reckless, or wanton disregard for life or property.

Appendix C

Supreme Court of Georgia.

No. 45255.

CORPORATION OF MERCER UNIVERSITY

v.

NATIONAL GYPSUM CO., et al.

June 9, 1988.

The United States Court of Appeals for the Eleventh Circuit, 832 F.2d 1233, certified a cause to the Georgia Supreme Court for determination of whether the discovery rule was applicable to property damage cases. The Supreme Court, Smith, J., held that discovery rule was confined to cases of bodily injury which developed over extended period of time and did not apply to cases involving property damage only.

Question answered.

1. Limitation of Actions 95(1)

Discovery rule is confined to cases of bodily injury which develop only over extended period of time and is not applicable to cases involving merely property damage; overruling *Lumbermen's Mutual Casualty Co. v. Pattillo Construction Co.*, 254 Ga. 461, 330 S.E.2d 344.

2. Limitation of Action 95(1)

Discovery rule was inapplicable to property damage case brought against several manufacturers of asbestos-containing construction product to recover in tort for injury to property arising out of sale to university of asbestos products. O.C.G.A. § 9-3-30.

3. Limitation of Actions 55(6)

Continuing tort theory is limited to cases in which personal injury is involved and is not applicable to cases which involve only property damage.

Corinne A. Houpt, Mercer University Atlanta, Cubbedge Snow, Jr., R. Napier Murphy, Martin, Snow, Grant & Napier, Macon, Darci L. Rock, Luis M. Nido, Alfred H. Ruemke, Bracewell & Patterson, Wash ington D.C., Martin W. Dies, Jr., Orange, Tex., for Corporation of Mercer University.

A. Stephen Clay, Mara McRae, Kilpatrick & Cody, Michael V. Elsberry, Mitchell, Loggins, Campbell & Elsberry, Atlanta, Gita F. Rothschild, McCarter & English, Newark, N.J., Jesse W. Hill, Powell, Goldstein, Frazer & Murphy, Ben L. Weinberg, Jr., U.S. Gypsum Co., Long, Weinberg, Ansley & Wheeler, David A. Handley, Smith, Gambrell & Russell, Atlanta, National Gypsum Com., Richard A. Bernstein, Hoyle, Morris & Kerr, U.S. Gypsum Co., Thomas B. Kenworthy, Morgan, Lewis & Bockuis, Philadelphia, Pa., Albert H. Parnell, Freeman & Hawkins, Atlanta, for Nat. Gypsum Co.

Shepard M. Remis, Sandra Sue McQuay, Goodwin, Procter & Hoar, Boston, Mass., for W.R. Grace & Co.

SMITH, Justice.

The United States Court of Appeals for the Eleventh Circuit certified the following question to this court:

"Whether the discovery rule is applicable to property damage cases where there is no applicable statute of repose but there are knowledge and concealment of hazardous defects?" Corp. Mercer University v. National Gypsum Co., 832 F.2d 1233 (1987). The answer to both parts of the question is no.

"On April 9, 1985, Mercer University filed actions in federal district court against several manufacturers of asbestos containing construction products. Among these manufacturing companies were defendants United States Gypsum, National Gypsum, and W.R. Grace & Co. The lawsuits were brought to recover damages in tort for injury to property arising out of the defendants' sale to Mercer University of asbestos products. Mercer alleged that these

products were installed in buildings constructed or renovated between 1906 and 1972 on its Atlanta and Macon campuses.

"Defendants moved for summary judgment on the ground that the plaintiff's claims were barred by the statute of limitations. The district court, applying Georgia's discovery rule, held that the four-year statute of limitations did not begin to run until Mercer knew or reasonably should have known that the removal of defendants' product was necessary to eliminate the hazard associated with the asbestos. It therefore denied the summary judgment motions. After a bifurcated trial, the jury awarded Mercer compensatory damages of $114,800.18 against National Gypsum, $284,901.00 against W.R. Grace & Co., and punitive damages of $1,000,000 against both companies. The subsequent appeals by National Gypsum and W.R. Grace h Co., and Mercer University's cross-appeal, were consolidated with Mercer's earlier appeal of the district court's dismissal of United States Gypsum." Id.

1. This case involves property damage only, there is no personal injury involved. The applicable statute of limitations in this case is OCGA § 9-3-30 which provides that the action must be brought within four years after the right of action accrues.

11,2] The plurality opinion in *Lumbermen's Mutual Casualty Co. v. Pattillo Construction Co.*, 254 Ga. 461, 330 S.E.2d 344 (1985), extended the discovery rule to property damage involved in that case over the dissent of three justices. Today, we expressly adopt the dissent written by Justice

Weltner, and hold that "the discovery rule of *King v. Seitzingers, Inc.*, 160 Ga. App. 818, 287 S.E.2d 252 (1981) [is confined] to cases of bodily injury which develop only over an extended period of time." To the extent anything in *Lumbermen's* is in conflict with this opinion, it is overruled. An action under OCGA § 9-3-30 must be brought within four years of substantial completion.

[31 2. The continuing tort theory expressed in *Everhart v. Rich's, Inc.*, 229 Ga. 798, 194 S.E.2d 425 (1972) is limited to cases in which personal injury is involved. It is not applicable to cases which involve only property damage.

Certified question answered.

MARSHALL, C.J., CLARKE, P.J., WELTNER and HUNT, JJ., and Judge JOEL J. FRYER, concur.

BELL, J., concurs specially. GREGORY, J., disqualified.

BELL, Justice, concurring specially.

I agree with the result in this case, because there is no applicable statute of repose. See my special concurrence in *Lumbermen's Mutual Casualty Co. v. Pattillo Construction Co.*, 254 Ga. 461, 466, 330 S.E.2d 344 (1985). However, I would continue to apply the discovery rule in instances where there is a statute of repose.

Appendix D

United States Court of Appeals,

Eleventh Circuit.
Nos. 87-8140

ST. JOSEPH HOSPITAL,

Plaintiff-Appellee

v.

The CELOTEX CORPORATION, as Successor to the Spraycraft Corporation(a Delaware Corporation), United States Gypsum Company (a Delaware Corporation),

Defendants-Appellants.

Sept. 6, 1988.

Hospital brought suit against manufacturers of asbestos-containing fire proofing sprayed in its building, seeking to recover cost of removal of the material. The United States District Court for the Southern District of Georgia, No. CV186-047, Anthony A. Alaimo, Chief Judge, rendered verdict for hospital, and manufacturers appealed. The Court of Appeals held that question of whether Georgia statute governing actions against asbestos manufacturers and suppliers involving property damage applied to cases pending at the time of statute's enactment so as to prevent those claims from otherwise being barred by applicable period of limitation would be certified to Georgia Supreme Court.

Question certified.

Federal Courts 392

Question of whether Georgia statute governing actions against asbestos manufacturers and suppliers involving property damage applied to cases pending at the time of statute's enactment so as to prevent those claims from otherwise being barred by applicable period of limitation would be certified to Georgia

Supreme Court. O.C.G.A.§§9-3-30.1, 15-2-9;Ga.Const. Art. 6,§6, Par. 4; Ga.Sup.Ct. Rules, Rule 37.

Greene, Buckley, DeRieux & Jones, John D. Jones, Carla A. Ford, Atlanta, Ga., Montgomery, McCracken, Walker & Rhoads, Ralph W. Brenner, Stephen A. Madva, Philadelphia, Pa., for Celotex.

Blatt & Fales, Edward J. Westbrook, Charleston, S.C., for plaintiff-appellee.

Freeman & Hawkins, Julia Bennett Jagger, Atlanta, Ga., Morgan, Lewis & Bockius, Thomas B. Kenworthy, Frank L. Corrado, Jr., Philadelphia, Pa., for U.S. Gypsum.

Appeal from the United States District Court for the Southern District of Georgia.

Before VANCE and CLARK, Circuit Judges, and GARZA*, Senior Circuit Judge.

PER CURIAM:

This appeal involves the applicability of a statute recently enacted by the Georgia legislature. Because of the importance of this issue of Georgia law to the resolution of several pending lawsuits, we believe that the Georgia Supreme Court should address the issue. We therefore certify the question to the Supreme Court of Georgia pursuant to Ga.Const. art. 6, § 6, para. 4, Ga.Code Ann. § 15-2-9 and Rule 37 of the Georgia Supreme Court.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF GEORGIA PURSUANT TO ARTICLE VI SECTION VI PARAGRAPH IV OF THE GEORGIA CONSTITUTION.

TO THE SUPREME COURT OF GEORGIA AND THE HONORABLE JUSTICES OF THAT COURT:

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* Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

I. Style of the Case

The style of the case in which this certificate is made is as follows: St. Joseph Hospital, Plaintiff-Appellee, versus the Celotex Corporation and United States Gypsum Company, Defendants-Appellants, Case No. 87-8140, filed in the United States Court of Appeals for the Eleventh Circuit, on appeal from the United States District Court for the Southern District of Georgia.

II. Statement of the Facts

On March 10, 1986 St. Joseph Hospital filed an action in federal district court against four manufacturers of asbestos-containing fireproofing sprayed in its building. Among these manufacturers were appellants Celotex Corporation and United States Gypsum Company. The fireproofing materials had been applied to steel beams in the hospital during a renovation project undertaken during 1969 and 1970. The asbestos was not discovered until March 1984, when the hospital initiated a subsequent renovation. The hospital removed the asbestos-containing material, and brought this action to recover the cost of the removal.

The defendants moved for summary judgement on the ground that the plaintiff's claims were barred by the four-year statute of limitations. See Ga.Code Ann.§9-3-30. The district court denied the motion on the ground that Georgia's discovery rule prevented the limitations period from commencing to run until St. Joseph knew or reasonably should have known that the asbestos fireproofing constituted a hazard requiring removal. After a five day trial the jury returned a verdict against Celotex for $300,000 and against USG for $200,000. The two defendants appealed.

III. Reasons for Certification

This case, like several others involving asbestos damage to buildings, involved Georgia's discovery rule. This rule provides that a cause of action in tort will not accrue until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, that he has been injured and that the injury may have been caused by the defendant. King v. Seitzingers, Inc., 160 Ga.App. 318, 287 S.E.2d 252, 254 (1981). At the time the parties argued the case before this court, the issue was whether the

discovery rule applied to tort actions involving injury to property as well as to those involving personal injury.

Ga.Code Ann. § 9-3-30, the statute of limitations applicable when the case was before the district court, provides that the action must be brought within four years after the right of action accrues. In Corporation of Mercer Univ. v. National Gypsum Co., 832 F.2d 1233 (11th Cir. 1987), which was argued before this case was argued, we certified to the Georgia Supreme Court the question of whether the discovery rule applies to property damage cases.[1]

The Georgia Supreme Court answered the certified question in the negative. See Corporation of Mercer University v. National Gypsum Co., 258 Ga. 365, 368 S.E.2d 732 (1988). The court held that the discovery rule in Georgia is confined to personal injury cases. Id., 368 S.E.2d at 733. The court concluded, therefore, that a cause of action under Ga.Code Ann. § 9-3-30 must be brought within four years of substantial completion of the damaged building or property. See id, 368 S.E.2d at 733.

While the case was pending before the Georgia Supreme Court, however, the Georgia legislature enacted a new statute governing actions against asbestos manufacturers and suppliers involving property damage. The new statute, Ga.Code Ann. § 9-3-30.1, which was signed by the governor and became law on April 14, 1988, provides:

> (a) Notwithstanding the provisions of Code Section 9-3-30 or any other law, every action against a manufac-

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[1] The question certified to the Georgia Supreme Court asked: "Wether the discovery rule is applicable to property damage cases where there is no applicable statute of repose but there are knowledge and concealment of hazardous defects?" 832 F.2d at 1236.

The question was phrased this way because there was some precedent in the courts of Georgia for the proposition that where there exists an applicable statute of repose, the discovery rule would apply in property damage cases.

See Lumbermen's Mut. Cas. Co. v. Pattillo Constr. Co., Inc., 254 Ga. 461, 330 S.E.2d 344 (1985). There was also some autahority for the position that the discovery rule might still apply, even without the existaence of an applicable statute of repose, where there were allegations of knowledge and concealment of hazardous defects. see *Mercer,* 832 F.2d at 1235–36; *U-Haul Co. of W. Georgia v. Abreu & Robeson, Inc.,* 247 Ga. 565, 277 S.E.2d 497, 499 (1981).

turer or supplier of asbestos or material containing asbestos brought by or on behalf of any person or entity, public or private; or brought by or on behalf of this state or any agency, department, political subdivision, authority, board, district, or commission of the state; or brought by or on behalf of any municipality, county, or any state or local school board or local school district to recover for:

(l) Removal of asbestos or materials containing asbestos from any building owned or used by such entity;

(2) Other measures taken to correct or ameliorate any problem related to asbestos in such building;

(3) Reimbursement for such removal, correction, or amelioration related to asbestos in such building; or

(4) Any other claim for damage to real property allowed by law relating to asbestos in such building which might otherwise be barred prior to July 1, 1990, as a result of expiration of the applicable period of limitation, is revived or extended. Any action thereon shall be commenced no later than July 1 1990.

(b) The enactment of this Code section shall not be construed to imply that any action against a manufacturer or supplier of asbestos or material containing asbestos is now barred by an existing limitations period.

(c) Nothing in this Code section shall be construed to revive, extend, change, or otherwise affect the applicable period of limitation for persons or entities not set forth and provided for in subsection (a) of this Code section.

(d) Nothing contained in this Code section the issue of the new statute's interpretation shall be construed to have any effect on actions for personal injury or any other claim except as specifically provided in this Code section.

This statute, if applied to cases like this one, would lift any statute of limitation bar. The Georgia Supreme Court, however,

did not consider the effect of this statute on Mercer's claim.[2] Appellants argue that the new statute does not apply "retroactively" to cases filed prior to April 14, 1988, the effective date of the new statute. Appellants maintain that the four year statute of limitations of Ga.Code Ann. § 9-3-30 applies (sans discovery rule) to all cases, like this one, filed prior to April 14, 1988.

Appellants, citing Hart v. Owens-Illinois, Inc., 250 Ga. 397, 297 S.E.2d 462 (1982), argue that because the language of Ga.Code Ann. § 9-3-30.1 does not "imperatively" require retroactive application, the statute should not apply to pending cases.3 Appellants specifically point to the language that any action under the new statute "shall be commenced" before July 1, 1990 as connoting application only to lawsuits commenced after the enactment of the new statute.[4]

We believe that it is appropriate for the Georgia Supreme Court to resolve this issue. As we noted in our previous opinion, these cases involve considerable amounts of money, and this court has a strong interest in faithfully applying Georgia law with scrupulous accuracy. Accordingly, we certify the issue of the new statute's interpretation and applicability to pending cases.[5]

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[2] On June 20, 1988 Mercer University filed a motion for reconsideration in the Supreme Court of Georgia, urging that the court apply Ga.Code Ann. § 9-3-30.1. The Georgia Supreme Court denied the motion on July 1.

[3] In *Hart,* the Georgia Supreme Court held that courts should not construe a statute to apply retroactively unless the language of athe statute requires it. 297 S.E.2d at 463. The court in *Hart* held that a sataute of limitation enacted after the right of action had vested in the plantiff would not be applied to bar the plaintiff's claim. This case presents the converse issue: whether a statute which revives or extends actions otherwise barred by a statute of limitation should not be applied to allow the plaintiff's claim.

[4] Appllants also argue that the Georgia Supreme Court's opinion in Mercer resolves the issue. The defendants in *Mercer* argued to the Georgia Supreme Court that the courtt should decline to address the new staatute because the issue was not relevant to the question certified by this court. The defendants in this case now argue that the Georgia Supreme Court's failure in *Mercer* to address the applicability of the new statute "conclusively resolved the issue." We do not, however, view such silence as resolution of such an important issue.

[5] We are reluctant to certify a second question in this series of Georgia asbestos property damage cases. We feel, however, tthat the importance of the issue and the strong intersts of the Georgia courts in this area require us to do so.

IV. Question to be Certified to the Georgia Supreme Court

Whether Ga.Code Ann. § 9-3-30.1 applies to cases pending at the time of the statute's enactment so as to prevent these claims from otherwise being barred by an applicable period of limitation?

The entire record in the case, together with the briefs of the parties, is transmitted herewith.

QUESTION CERTIFIED.

Appendix E

Supreme Court of Georgia.

No. 46200.

CELOTEX CORP. et al.

v.

ST. JOSEPH HOSPITAL

March 2, 1989.

Reconsideration Denied March 29, 1989.

Hospital brought suit against manufacturer of asbestos-containing fireproofing sprayed in its building, seeking to recover costs of removal of material. The United States District Court for the Southern District of Georgia, Anthony A. Alaimo, Chief Judge, rendered verdict for hospital, and manufacturers appealed. The Court of Appeals for the Eleventh Circuit, 854 F.2d 426, certified question of whether Georgia statute providing for revival or extension of actions against asbestos manufacturers or suppliers applied to cases pending at time of statute's enactment so as to prevent claims from otherwise being barred by applicable limitations period. The Supreme Court held that statute's separate classification was unreasonable and statute thus violated state equal protection.

Certified question answered in the negative.

Hunt, J., dissented and filed opinion in which Bell, J., joined.

Constitutional Law 249(3)

Limitation of Action 4(2)

Statute providing for revival or extension of actions against asbestos manufacturers did not apply to cases pending at time of statute's enactment so as to prevent those claims from being

otherwise barred by applicable limitations period; statute's separate classification was unreasonable and violated state equal protection. O.C.G.A. § 9-3-30.1; Const. Art. 1, § 1, Par. 2; Art. 3, § 6, Par. 4(a).

Speights & Runyan, Daniel A. Speights, Hampton, S.C., Ness, Motley, Loadholt, Richardson & Poole, Edward J. Westbrook,

Blatt & Fales, Charleston, S.C., Weeks, Chandler, Sams, Weatherly, & Shinall, Charles Weatherly, for St. Joseph Hosp. Julia Bennett Jagger, Freeman & Hawkins, Atlanta, Thomas B. Kenworthy, Frank L Corrado, Jr., Morgan, Lewis & Bockius, Philadelphia, Pa., John D. Jones, Carla A. Ford, Greene, Buckley, DeRieux & Jones, Atlanta, Ralph W. Brenner, Stephen A. Madva, Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa., for The Celotex Corp. et al. Michael J. Bowers, Atty. Gen., Charles M. Richards, Asst. Atty. Gen., amicus curiae.

PER CURIAM.

The Certified Question.

The United States Court of Appeals for the Eleventh Circuit certified the following question to this court: "Whether [OCGA] §9-3-30.1 applies to cases pending at the time of the statute's enactment so as to prevent these claims from otherwise being barred by an applicable period of limitation?" St. Joseph Hospital v. Celotex Corp., 854 F.2d 426 (1988).

On March 10,1986 St. Joseph Hospital filed an action in federal district court against four manufacturers of asbestos-containing fireproofing sprayed in its building. Among these manufacturers were appellants Celotex Corporation and United States Gypsum Company. The fireproofing materials had been applied to steel beams in the hospital during a renovation project undertaken during 1969 and 1970. The asbestos was not discovered until March 1984, when the hospital initiated a subsequent renovation. The hospital removed the asbestos-containing material, and brought this action to recover the cost of removal.

The defendants moved for summary judgment on the ground that the plaintiff's claims were barred by the four-year statute of limitations. See [OCGA] § 9-3-30. The district court denied the motion on the ground that Georgia's discovery rule prevented the limitations period from commencing to run until St. Joseph knew or reasonably should have known that the asbestos fireproofing constituted a hazard requiring removal. After a five day trial the jury returned a verdict against Celotex for $300,000 and against USG for $200,000. The two defendants appealed. *Id.*

OCGA § 9-3-30.1, effective April 14, 1988, provides: (a) Notwithstanding the provisions of Code Section 9-3-30 or any other law, every action against a manufacturer or supplier of asbestos or material containing asbestos brought by or on behalf of any person or entity, public or private; or brought by or on behalf of this state or any agency, department, political subdivision, authority, board, district, or commission of the state; or brought by or on behalf of any municipality, county, or any state or local school board or local school district to recover for:

(1) Removal of asbestos or materials containing asbestos from any building owned or used by such entity;

(2) Other measures taken to correct or ameliorate any problem related to asbestos in such building;

(3) Reimbursement for such removal, correction, or amelioration related to asbestos in such building; or

(4) Any other claim for damage to real property allowed by law relating to asbestos in such building which might otherwise be barred prior to July 1,1990, as a result of expiration of the applicable period of limitation, is revived or extended. Any action thereon shall be commenced no later than July 1, 1990.

(b) The enactment of this Code section shall not be construed to imply that any action against a manufacturer or supplier of asbestos or material containing asbestos is now barred by an existing limitations period.

(c) Nothing in this Code section shall be construed to revive, extend, change, or otherwise affect the applicable period of limita-

tion for persons or entities not set forth and provided for in subsection (a) of this Code section.

(d) Nothing contained in this Code section shall be construed to have any effect on actions for personal injury or any other claim except as specifically provided in this Code section.

Our Response.

We find that OCGA § 9-3-30.1 constitutes a special law within the meaning of Art. 3, Sec. 6, Para. 4(a) of the Constitution of Georgia of 1983, which provides: "Laws of a general nature shall have uniform operation throughout the state and no local or special law shall be enacted in any case for which provision has been made by an existing general law...."

OCGA § 9-3-30.1, like the statute at issue in *Lasseter v. Ga Public Service Commission*, 263 Ga. 227, 319 S.E.2d 824 (1984),

> deals with a limited activity in a specific industry during a limited time frame.... To designate this as a general law would amount to the acceptance of a fiction which would strain the credibility of the court. It is a special law and must stand or fall as viewed in that posture.

Id., at p. 229, 319 S.E.2d 824.

As we stated in *Lasseter*,

> In so viewing the statute, we first note that the constitution does not prohibit special laws per se. The legislature may enact special laws affecting special classes, but it cannot do 80 if it has previously legislated in that area by general law nor may it do so if the classification of those affected is unreasonable. The preemption is expressly covered by [Art. 3, Sec. 6, Para. 4 of the Constitution of Georgia of 1983.] The requirement of reasonable classification comes from the equal protection guarantee. Art. 1, Sec. 1, Par. 2, 1983 Georgia Constitution.

Id. at pp. 229-30, 319 S.E.2d 824.

This act singles out for special treatment property claims against manufacturers and suppliers of asbestos and differentiates

them from *all* other claims that might be based upon other hazardous or toxic substances. Because we do not find this separate classification to be reasonable, the statute does not meet constitutional standards.

In light of this disposition, we answer the certified question in the negative.

CERTIFIED QUESTION ANSWERED.

All the Justices concur, except HUNT and BELL, JJ., who dissent and GREGORY, J., not participating.

HUNT, Justice, dissenting.

I respectfully dissent. AS the majority acknowledges, the legislature may enact special laws if the classification of those affected is reasonable. Accordingly, we have consistently upheld special laws where there is reasonable justification for the law. See, e.g., *Lesseter v. Ga Public Service Commission,* 253 Ga. 227, 319 S.E. 2d 824 (1984) (coal conversion statute applicable to particular class of power plants created reasonable classification); *McAllister v American National Red Cross,* 240 Ga. 246, 240 S.E.2d 247 (1977 (statute requiring showing of negligence in sale of blood was reasonable); *C & S Natl. Bank v. Mann,* 234 Ga. 884, 218 S.E.2d 693 (1976) (statute classifying married women whose separate estates consist of real property and/or intangible personal property differently from married women whose separate estates consist of tangible personal property); *Black Blanchard* 227 Ga. 167,179 S.E.2d 228 (1971) (statute providing exemptions for certain individuals running for office of school superintendent established reasonable classification).

It is undeniable that asbestos in buildings presents significant health and economic problems. The legislature of Georgia, like that of several other states, including Massachusetts, New York and Minnesota, chose to respond to some of these problems by enacting a statute which would lift a statute of limitation bar to asbestos-related property damage suits. I do not believe we can legitimately label this statute unreasonable, particularly in light of our duty to construe a statute as constitutional, where possible. While the court may not agree with the wisdom of the statute, we

are not authorized to second guess the legislature. I would hold the lease. statute is not prohibited as a special law, and is not otherwise invalid, and would answer the certified question in the affirmative.

I am authorized to state that Justice Bell joins in this dissent.

Appendix F

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF
GEORGIA MACON DIVISION

NO 85-126-3-MAC

THE CORPORATION OF
MERCER UNIVERSITY,

Plaintiff

v.

NATIONAL GYPSUM COMPANY, et al.,

Defendants

ORDER

The jury in the above-styled asbestos property damage action, wherein plaintiff sought to recover the cost of asbestos removal from its buildings, returned a verdict in favor of the plaintiff, Mercer University, awarding both compensatory and punitive damages. Presently before the Court are: (1) the joint motion of defendants National Gypsum Company and W.R. Grace & Company for judgment notwithstanding the verdict or, alternatively, for a new trial and (2) the separate motion of W.R. Grace & Company for judgment notwithstanding the verdict or, alternatively, for a new trial. In their motions, defendants argue that the evidence was insufficient to support the jury's verdict in several respects and that the Court committed numerous errors in its rulings on the admissibility of evidence and in its instructions to the jury.

The standards for awarding judgment notwithstanding the verdict and a new trial are well settled. The Court should grant judgment notwithstanding the verdict only if, drawing all

reasonable inferences in favor of the non-moving party, reasonable jurors could not arrive at a contrary verdict. *E.g., O'Neil v. W.R. Grace & Co.,* 410 F.2d 908, 911 (5th Cir. 1969). A motion for a new trial should be granted if the verdict is contrary to the *great* weight of the evidence. *Williams v. City of Valdosta,* 689 F.2d 964, 973 (11th Cir. 1982). A new trial is also required where, in ruling on the admissibility of the evidence, the Court makes an error affecting the substantial rights of the parties, Fed.R.Civ.P. 61, or where the charge, taken as a whole, fails to explain the law clearly enough to be understood by jurors of ordinary capacity, *e.g., Reyes v. Wyeth laboratories,* 418 F.2d 1264, 1289 (5th Cir.), *cert. denied,* 419 U.S. 1096 (1974). Objections to the charge, however, must be preserved by specifically stating the matter to which the party objects and the grounds of the objection prior to the jury's retiring to deliberate. Fed.R.Civ.P. 51.

I. Joint Motion

A. Insufficient Evidence

Defendants argue that the evidence was insufficient to support the jury's verdict in four respects. They first argue that there was no evidence in the record which authorized the jury to find that the products at issue were unreasonably dangerous. There are two problems with this argument.

The first problem is that the argument is premised on one air sample test which showed an "extremely low" level of airborne asbestos fibers in one of the buildings involved in this suit. At trial, however, the use of air sampling to determine the danger presented by airborne asbestos was criticized. For example, Dr. Keyes testified that, because air sampling only measures a limited amount of air at a given time, air sampling should not be used to determine whether there is an asbestos hazard in buildings. Moreover, Grace itself removed the asbestos-containing materials from its own buildings, notwithstanding air sample reports of low levels of asbestos. Obviously, the jury was entitled to give little or no weight to the air sample test results introduced by the defendants.

The second problem with defendants' argument is that, in a failure-to-warn/test case, a small risk of harm can render a product

unreasonable dangerous. All that is required is that the risk be one of which reasonable persons would want to know. *E.G., Morgan v. Johns-Manville Sales Corp.*, 691 F.2d 811, 814 (6th Cir. 1982). A risk of one-in-a-million has been held sufficient. *Davis v. Wyeth Laboratories*, 399 F.2d 121, 129-130 (9th Cir. 1968).

That the quantity of risk giving rise to a duty to warn is very small, and that the duty to warn attaches long before there is a consensus in the scientific community, is brought home by *Wells v. Ortho Pharmaceutical Corp.*, 615 F.2d 262 (N.D.Ga. 1985), *aff'd*, 788 F.2d 741 (11th Cir. 1986). In *Wells*, the court found that the duty to warn that certain spermicides might cause birth defects arose "as soon as there was a 'hint' of a possibility that the [spermicide] causes birth defects." *Id.* at 294. Further, that there were strong disagreements among competent members of the scientific community on whether the spermicide in question causes birth defects was held to be of no avail to the defendants. In such a situation, the court ruled, the consumer should be warned and thereby be given the opportunity to decide for herself whether to use the product. *Id.* at 295.

In addition to the quantity of risk, the jury here could also properly consider the quality of risk. There is no dispute that asbestos fibers cause mesothelioma, lung cancer and asbestosis. The seriousness of these diseases needs no elaboration.

The parties presented an abundance of credible evidence on both sides of the dangerousness issue, with sharp conflicts among various witnesses' testimony. A determination either way would have been amply supported by the evidence. It follows that the jury's finding that the products at issue were unreasonably dangerous was neither a conclusion which reasonable jurors could not reach, nor contrary to the great weight of the evidence.

The defendants also argue that, because the scientific community had not focused on a hazard from asbestos-containing plasters at the time of sale to Mercer, they cannot be held liable to Mercer for failure to warn or test about a danger from those products. This argument is simply wrong. As the leading asbestos case makes clear, the fact that manufacturers must be aware of the knowledge held by the scientific community. *Borel v. Fibreboard*

Paper Products Corporation, 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). A jury is not precluded from finding that a manufacturer knew or should have known something that the scientific community had not yet gotten around to studying. *See City of Greenville v. W.R. Grace & Co.*, slip op. No. C/A 85-1693-3, at p.7 (D.S.C., June 11, 1986). Accordingly, even assuming defendants' factual characterization of the evidence on the knowledge of the scientific community is correct, their legal argument that the jury is therefore prohibited from finding them negligent is *not* correct.

Next, defendants argue that the evidence did not support an award of punitive damages. In connection with this, defendants argue that the evidence Mercer relies on to support its entitlement to punitive damages cannot be the basis for an award of punitive damages in this case because it does not relate to their sales of asbestos-containing plaster to Mercer. Rather, they characterize that evidence as concerning occupational exposure to asbestos at high levels.

The Court agrees with the defendants to the extent that, for the jury's award of punitive damages to stand, the evidence must support as a reasonable conclusion that these defendants engaged in willful misconduct or acted with that entire want of care which would raise a presumption of conscious indifference to the consequences of selling the products at issue to Mercer without testing them for a hazard or warning about a possible hazard. *Citizens & Southern National Bank v. Bougas*, 245 Ga. 412, 413-14, 265 S.E.2d 562 (1980). The Court disagrees with defendants in that it finds that the evidence authorized the jury to reach such a conclusion.

No doubt an important part of the evidence supporting an award of punitive damages here is the evidence on the defendants knowledge and actions, or lack of action, with respect to asbestos in different settings and years before the sales of asbestos-containing plaster to Mercer. Some of that evidence shows that, for a minimum of several decades, Grace and National Gypsum knew that asbestos fibers cause fatal diseases. They also knew that workers in their mines and plants, as well as those installing their products, were being exposed to asbestos at such levels that a

substantial number of them would develop these diseases. In the face of this knowledge, these defendants consciously chose not to warn. Moreover, they took affirmative action to conceal these hazards and to hinder research that would shed light on them.

With this as a background, the jury was to consider the defendants' sales to Mercer with no warnings and without testing their products. The jury may well have found that it should have been obvious to manufacturers like National Gypsum and Grace that asbestos-containing ceiling plasters might be hazardous. As the United States District court for the District of South Carolina noted in another asbestos property damage action:

> If the people manufacturing the asbestos or putting it in buildings were known to be at risk, logic suggests that manufacturers should anticipate that others who would work around the material or eventually have to remove it during renovations or demolition would also be at risk.... It requires little foresight to anticipate that material put on ceilings or beams would not stay there forever.

City of Greenville, supra, at 11 n. 1. Indeed, the evidence reflected that National Gypsum was aware of a "dustiness" problem with an asbestos-containing plaster it manufactured.

The jury could have also considered the evidence indicating that the technology now used to test asbestos-containing plasters for release of asbestos fibers, the electron microscope, had been in existence for many years before the sales to Mercer. these defendants, however, made no attempt to employ the electron microscope to test the products, nor made any attempt to test the products for hazardousness through any other method. Yet, when asked by customers if these products (containing a known carcinogen) were hazardous, National Gypsum assured them that they were not.

The jury could also consider Grace's removal of the asbestos-containing materials from its *own* buildings within five years of the sales to Mercer, while continuing to maintain that the products are not hazardous. Also of interest to the jury would be Grace's substitution of paper for asbestos in the ceiling plaster it sold in

the Northeast, while continuing to sell plaster with asbestos in it in other regions of the country.

In light of the entire course of conduct of the defendants concerning asbestos hazards, the obviousness of the potential hazards presented by the products in this case, the complete failure to test those products and the absence of any testimony from defendants' employees refuting awareness of the hazard, the jury could reasonably conclude that the defendants' failure to test or warn in this case was not a matter of mistake, ignorance or mere negligence. To the contrary, the jury was authorized to find that, in selling the products at issue to Mercer without warning and without testing, both National Gypsum and W.R. Grace acted with that entire want of care which would raise a presumption of conscious indifference to the consequences. Accordingly, defendants are not entitled to judgment notwithstanding the verdict on the issue of punitive damages.

Defendants' final argument on the sufficiency of the evidence is that there was no evidence int he record that Mercer's expenses in removing the asbestos were reasonable. This argument is based on the inability of an accountant who testified for Mercer to state whether the amounts spent by Mercer to remove the asbestos were reasonable. Mercer proved that its expenses were reasonable, however, through other witnesses. In particular, the testimony concerning the specification and bidding process utilized by Mercer allowed the jury to find that the expenses Mercer incurred in removing the asbestos were reasonable.

B. Admission/Exclusion of Evidence

Defendants argue that the testimony concerning the alleged asbestos-related diseases of three of Mercer's maintenance men was irrelevant and, in addition, should have been excluded under Fed.R.Evid. 403. All that is required for evidence to be relevant is that it have "any tendency to make the existence of any fact of consequence to the action more or less probable than it would be without the evidence." Fed.R.Evid. 401. It is *not* necessary that the evidence on the asbestosis of the maintenance me,standing alone, be sufficient to support the jury's finding that the products at issue are unreasonably dangerous.

One of the principal issues in this case was whether the defendants' asbestos-containing ceiling plasters cause disease. Testimony that three of Mercer's maintenance men -- who during their 20-year careers repaired and worked in proximity to asbestos-containing ceilings — were afflicted with asbestosis tends to make it more likely that defendants' similar products also cause asbestos-related disease.

The probative value of this testimony was not destroyed by incidental exposure to asbestos other than from ceiling products or because the asbestos products to which the maintenance men were exposed were not shown to have been manufactured be the defendants. It is certainly foreseeable that people who ware exposed to asbestos through ceiling products will also suffer other exposure. The defendants themselves offered testimony that everyone is exposed to asbestos and everyone has asbestos fibers in his or her lungs. The defendants had the opportunity to present evidence of any significant exposure to asbestos other than through asbestos-ceiling products, just as they had the opportunity to distinguish between conditions on the Macon and Atlanta campuses of Mercer University.

In support of their argument, defendants rely on *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1221 (S.D. N.Y. 1985). That decision is inapposite. In *Agent Orange*, the court excluded experts' opinions that a variety of diseases with many possible causes were caused by "Agent Orange" because the opinions did not have a sufficient basis. *Id.*, at 1248-56. Here, the issue was not causation, but diagnosis, and the experts who testified that the maintenance men had asbestosis relied on adequate information of the type usually relied on to make such diagnoses.

The Court also finds that the evidence was not inadmissible under Rule 403. It fails to see how the admission of this evidence caused any real possibility of prejudice, confusion or misleading the jury. Finally, the evidence, although time-consuming, was important in light of the defendants' position that the products at issue do not cause disease.

Defendants also maintain that the Court erred in excluding the comparative risk assessment testimony of Dr. Crump, a statis-

tician. The Court allowed Dr. Crump to testify on the risks of disease from asbestos fibers at different levels based on various mathematical models. What the Court did not allow Dr. Crump to testify on was the risks associated with eating peanut butter and drinking diet soda, etc.

Unlike the case on which defendants' rely, this case does not involve a cost-benefit analysis or the setting or exposure levels based on a complicated regulatory scheme. As far as the level of risk was concerned, all the jury was required to do here was determine if the risk was one of which reasonable people would want to know. In the context of this case, the probative value of the preferred comparative risk testimony was substantially outweighed by the considerable delay and possible confusion of the issues it would have caused. The Court did not err in excluding this testimony.

C. Court's Instructions to the Jury

Defendants first argue that the Court erred in mentioning to the jury the NESHAP regulations, 40 C.F.R. §§ 6101. *et seq.* (1985). Those regulations, promulgated in 1973, require that certain procedures be followed in the renovation and demolition of buildings containing asbestos.

Defendants argue that mention of the NESHAP regulations, which post-date their sales to Mercer, was error because post-sale regulations cannot be used to assess conduct which occurred before the regulations were in existence. The Court agrees that post-sale regulations cannot be used to judge the conduct of the defendants. That is why the Court painstakingly instructed the jury to determine whether the defendants were negligent by examining what the defendants knew or should have known at the time of the sales to Mercer. It is also why the Court instructed the jury on the NESHAP regulations — not to be used to assess the defendants' conduct, but strictly to assess Mercer's post-regulation decision to remove the asbestos-containing plaster. The NESHAP charge was not erroneous.

Defendants also contend that the Court erroneously instructed the jury that it could award punitive damages "to punish" the defendants. Ironically, the defendants requested just such an

instruction. In Georgia, punitive damages are available only for the purpose of deterrence or for wounded feelings. O.C.G.A. § 51-12-5 (1982). Since wounded feelings were not an issue in this case, punitive damages were available only to deter.

Punishment can serve three purposes: retribution, *deterrence* and reformation. Assessing damages over and above what is necessary to compensate for the harm done is punishment. assessing such damages for the purpose of deterrence is an attempt to deter through punishment, and is precisely what punitive damages under Georgia law are. What is not allowed under Georgia law is the imposition of punitive damages for retribution. On the whole, the Court's instructions to the jury — which included instructing the jury that Mercer sought punitive damages to deter the defendants by punishing them and that punitive damages were to deter or, in other words, to teach the defendants a lesson — adequately and correctly explained Georgia punitive damages law.

Finally, defendants argue that the Court erroneously instructed the jury that the defendants had a duty to recall their products. The defendants, however, did not preserve this objection for review. In stating their objections to the charge, defendants completely failed to explain on what ground they objected to the recall charge.

D. Miscellaneous Alleged Errors

As additional grounds for a new trial, defendants raise several issues which this Court thought it had put to rest long ago. These matters are whether Mercer's negligence claim is barred by the economic loss rule, whether Mercer's entire negligence claim is barred by the statute of limitation, whether the compensatory and punitive damages issues should have been considered by the jury separately and whether a new jury was required for the merits phase of the trial. While, of course, defendants are entitled to raise these issues on appeal, the Court declines to address them again here. The Court stands on its earlier ruling.

II. W.R. Grace's Motion

Grace asserts two grounds in its motion. First, it argues that there was no evidence from which the jury could reasonably con-

clude that a product manufactured by Grace was present in the buildings at issue. Second, Grace contends that the Court erred in failing to charge the jury that Mercer had the burden of proving that Grace's products were present int he buildings at issue to recover against it.

The evidence on whether Grace's product was present in buildings B and C did not compel a finding in either party's favor. The deposition testimony of Silver, a plasterer, and Deckbar, and architect, was far from conclusive on the matter. Neither was able to testify with any degree of certainty that Grace's plaster was not used in buildings B and C. Mercer offered the testimony of Dr. Rohl, who had analyzed bulk samples of the ceiling plaster used in buildings B and C. Dr. Rohl testified to the effect that, based on his analyses, Grace had probably manufactured the ceiling plaster used in buildings B and C. Grace offered no contrary bulk-sample analysis testimony. On this record, it would be an abuse of discretion to invade the province of the jury.

Grace's argument that it is entitled to a new trial because the Court failed to instruct the jury that Mercer had the burden of proving that Grace's products were in its buildings to recover cannot be sustained for two reasons. First, the Court *did* instruct the jury that defendants contended that their products were not present in Mercer's buildings and that Mercer had the burden of proving that defendants' products were present.

Second, the Court instructed the jury that to recover Mercer had to prove that Grace breached a duty owed Mercer under the law, proximate cause and injury. That Grace manufactured the plaster used in buildings B and C is not an additional element that Mercer had to prove. It is merely a more particularized statement of the minimum that Mercer had to prove to establish proximate cause. The Court gave both a general proximate cause instruction and an instruction using the exact language Grace argues the Court should have used. Grace clearly is not entitled to a new trial because the Court did not use the particular language that Grace

wanted, but did not request, precisely at the point in the charge where Grace wanted it.

CONCLUSION

The joint motion of National Gypsum Company and W.R. Grace & Company for judgment notwithstanding the verdict or, alternatively, for a new trial is DENIED. The motion of W.R. Grace & Company for judgment notwithstanding the verdict or, alternatively, for a new trial is also DENIED.

SO ORDERED, this 25th day of August, 1986.

CHIEF JUDGE, UNITED
STATES DISTRICT COURT
SOUTHERN DISTRICT OF
GEORGIA,
Sitting by Designation

Appendix G

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF
GEORGIA MACON DIVISION

NO. 85-126-3-MAC

THE CORPORATION OF
MERCER UNIVERSITY,

Plaintiff

v.

NATIONAL GYPSUM COMPANY, et al.,

Defendants

ORDER

Plaintiff, The Corporation of Mercer University ("Mercer") brought this property damage action against some 35 defendants. Mercer alleges that the five remaining defendants manufactured asbestos-containing products which were placed in Mercer's building and subsequently had to be removed because they posed a serious health hazard. The damages Mercer seeks to recover are based on its expenses in removing from its buildings the asbestos-containing products, and all items contaminated with asbestos fibers released by those products.

Mercer has alleged seven counts in its complaint: (1) negligence, (2) nuisance, (3) trespass, (4) fraud, (5)restitution, (6) "CERCLA" and (7) punitive damages. Presently before the Court are motions by the defendants for summary judgement or, in the alternative to dismiss each of the counts of the complaint, except the punitive damages count. Also before the Court is defendants' motion for summary judgment based on the statute of limitations.

The Court heard oral argument on the substantive motion on February 10, 1986, and on the statute of limitation on February 10 and 25, 1986.

I. Negligence

A. Summary Judgement/Dismissal

Defendants argue that Mercer's negligence count should not go forward at least insofar as Mercer seeks to recover the cost of removing the defendants' products from its buildings. Such damages, defendants contend, are not recoverable in negligence actions in Georgia under the "economic loss rule." The "economic loss rule" is the name given "to the general rule that an action in negligence does not lie absent personal injury or damage to property other than the allegedly defective product." *Vulcan Materials Co., Inc. v. Driltech, Inc.*,251 Ga. 383, 388, 306 S.E. 2d 253 (1983). When the economic loss rule applies, warranty is the appropriate cause of action. *Chrysler Corp. v. Taylor,* 141 Ga. App. 671, 672, 234 S.E. 2d 123 (1977).

Mercer has alleged that it suffered damage to property other than the defective products themselves. Complaint at 117. Much of Mercer's damages, however, is the cost of removing the defendants' products. The Georgia Court of Appeals has held that, in a negligence action where there is both damage to the defective product itself and damage to other property, only the damage to other property is recoverable in negligence. *Mike Bajalia, Inc. v. Amos Construction Co., Inc.,* 142 Ga. App 225, 226, 235, S.E. ed 664 (1977). Since, under that decision, if the economic loss rule applies, Mercer would be precluded from recovering most of its damages on a negligence theory, the Court must decide whether the economic loss rule applies in the instant case.

All of the economic loss rule cases have involved situations where there was a qualitative defect in the product on which the suit was based; that is, a defect affecting the product's performance of its intended function. See, e.g., *Unger v. Bryant Equipment Sales & Service, Inc.,* 173 Ga. App. 326 S.E. 2d 483 (1985); *McClain v. Harveston,* 152 Ga. App. 422, 263 S.E. 2d 228 (1979); *Henderson v. General Motors Corp.,* 152 Ga. App 63, 262 S.E. 2d 238 (1979). That situation is quite different from the one presented by this case.

Here, Mercer has not alleged that the defendants' products did not perform their intended function satisfactorily. Rather, Mercer has alleged that the presence of such products in this university building presented an unreasonable personal health risk.

Because there is no Georgia decision dealing with the application of the economic loss rule to a lawsuit in which the damages sought are based on the cost of removing or replacing a hazardous but not qualitatively deficient product, it is the task of this Court to decide the question in the same manner as it believes the Georgia Supreme Court would. *Galinda v. Precision American Corp.*, 754 F.2d 1212m 1217 (5th Cir. 1985); *First Nat. Life Ins. Co. v. Fidelity & Deposit Co, of Maryland,* 525 F.2d 966, 968 (5th Cir. 1976). The Georgia Supreme Court's decision in *Vulcan Materials Co., Inc. v. Driltech, Inc., supra,* sheds some light on how that Court would be inclined to rule on the issue.

In *Vulcan*, a part in a drilling machine fractured, causing the machine to release hydraulic fluid. Id. at 383. The fire which resulted destroyed the machine but caused no personal injury or other property damage. Id. In answering questions certified for the Eleventh Circuit, the Court held that there is an accident exception to the economic loss ruler, defining accident as "a sudden and calamitous event which, although it may only cause damage to the defective product itself, poses an unreasonable risk of injury to other persons or property." Id. at 388.

In its opinion, the Supreme Court of Georgia quoted the following language:

> Although strict liability in tort developed out o the law of warranties, the courts of most states have recognized that the principles of warranty law remain the appropriate vehicle to redress a purchaser's disappointed expectations when a defect renders a product inferior or unable adequately to perform its intended function... These courts have classified the damages consequent to qualitative defects, such as reduced value, return of purchase price, repair and replacement, or lost profits, as economic loss, and have relegated those who suffer such commercial losses to the remedies of contract law.

> On the other hand, almost all courts have adopted the view that the benefit of the bargain approach of warranty law is ill-suited to correct problems of hazardous products that cause physical injury. Manufacturers are better able to bear the risk or to take action to correct flaws that pose a danger. *Accordingly, tort law imposes a duty on manufactures to produce safe items, regardless of whether the ultimate impact of the hazard is on people, other property, or the product itself.*
>
> In cases such as the present one where only the defective product is damaged, the majority is to identify whether a particular injury amounts to economic loss or physical damage. In drawing this distinction, the items for which damages are sought, such as repair cost, are not determinative. Rather, the line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the expectation-bargain protection policy of warranty law is most applicable to particular claim.

Id. at 386-87, quoting *Pennsylvania Sand Glass Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981)(emphasis of Georgia Supreme Court). This passage contains several principles which militate in favor of holding the economic loss rule inapplicable to the case at hand. First is the duty of manufactures to produce safe products, irrespective of the manner in which the safety defect manifest itself. Second is that the type of damages sought, the sole basis of defendants' argument that the economic loss rule does not apply. The nature of the defect is safety, not quality, and the risk involved is personal injury.

Also instructive in predicting the result that the Georgia Supreme Court would reach are the decisions of other courts that have addressed the identical issue. Courts in other states that also apply the economic loss rule have uniformity held that a school's cost in removing asbestos-containing products from its building are recoverable in negligence actions. E.g., *Town of Hooksett v. W.R. Grace & Co.*, 617 F. Supp. 126, 131 (D.N.H. 1984); *Hopkins County*

Board of Education v. National Gypsum Co., No. 119 (Ct. Common Pleas of Philadelphia Co., Pa., Sept. 7, 1983); *Cinnaminson Twp. Board of Education v. U.S. Gypsum Co.*, 552 F.Supp. 855, 858-59 (D.N.J. 1982). Those courts reached their results by applying the same principles quoted by the Georgia Supreme Court in Vulcan.

This Court is confident that the Georgia Supreme Court would hold that Mercer may recover the cost of removing the defendants' product in a negligence action. Accordingly, defendants products in a negligence action. Accordingly, defendants' motion for summary judgment or, in the alternative, to dismiss the negligence count of the complaint is DENIED.

B. Statute of Limitations

The statute of limitations in all property damage actions in Georgia is four years after the right of action accrues. O.C.G.A. 9-3-30 (1982). The parties agree that any cause of action Mercer's that accrued before April 9, 1981, is time-barred. See Mercer's Omnibus Brief at 47, 49; Defs' Reply Brief on Statute of Limitations at 1.

Under the discovery rule, the statute of limitations does not begin to run until the plaintiff discovers, or reasonably should have discovered, both the particular injury for which relief is sought have discovered, both the particular injury for which relief is sought and the casual connection between that injury and the defendant's conduct . E.g., *Anderson v. Sybron Corp.*, 165 Ga. App. 566, 299 S.E.2d 160, aff'd, 251 Ga. 593, 310 S.E.2d 232 (1983). The defendants maintain, however, that the discovery rule does not apply here. Rather, they maintain that the statute of limitations began to run on Mercer's negligence count at the time that their products were installed. Defendants base this argument on *Lumbermen's Mutual Casualty Co. v. Pattillo Construction Co.*, 254 Ga. 461, 330 S.E.2d 344 (1985). In that case, a plurality of the Georgia Supreme Court held that the discovery rule applied in negligent design and construction property damage cases. Id. at 465. Three members of the Court dissented, however, arguing that under no circumstances should the discovery rule be applies in such cases, id. at 466(Weltner, J., dissenting), and one member of the Court concurred, stating that he agreed with the result in the case only

because a statute of repose applied, id. (Bell, J., concurring). No statute of repose applies in the instant case.

Lumbermen's does not control the result in this case. The cause of action involved there was negligent design and construction, which is not a continuing tort. See *Milliard Mathews Builders, Inc. v. Plant Improvement Co.*, 167 Ga. App. 855, 855-56, 307 S.E.2d 739(1985). Mercer's negligence claim is based on failure to warn and failure to test, both of which are continuing torts. *Everhart v. Rich's, Inc.*, 229 Ga. 798, 194 S.E.2d 425 (1972). There are numerous Georgia decisions holding that the discovery rule applies to continuing tort claims. E.g., *Everhart, supra; King v. Seitzingers, Inc.*, 160 Ga. App. 318, 387 S.E.2d 252 (1981). See also *McAuley v. Wills*, 251 Ga. 3, 303 S.E.2d 258(1985) While in each of those cases the plaintiff sought to recover for personal injuries, the Georgia Supreme Court has stated that the discovery rule would apply in analogous situations. *Everhart*, 229 Ga. at 802. As explained more fully in the foregoing discussion of the defendants' economic loss argument, this is a hybrid personal injury/property damage case. Asbestos has no effect on the structure of a building; the only problem with its use is the effect it may have on people who use the building. Thus, this case is analogous to a personal injury action. Further, if the discovery rule did not apply here, manufactures would be encouraged not to warn consumers of hazards in their products. This Court is confident that the Georgia Supreme Court would not countenance such a situation and would apply the discovery rule to the case at bar.

The is no dispute in the evidence in the record that many Mercer officials were aware of the alleged hazards of the use of asbestos in building in 1980. See Exhibits cited on pp. 3-7 of Defs' Brief on Statute of Limitations(hereinafter "defs' Statute Brief"). It is also undisputed that Mercer knew by the end of 1980 that asbestos-containing materials were present in at least eight buildings on its Macon campus. See Ex. 9 to Defs' Statute Brief, at 110. Defendants maintain that the combination of knowledge the presence of asbestos in the eight buildings was hazardous, started the statute running, at least as to those eight buildings. Mercer contends that, prior to April 9, 1981, it had not discovered, the particular property damage injury it had suffered, because it had

not yet determined what measures would be necessary to abate the hazard that the presence of the defendants' products posed. Mercer argues that, under the unusual facts of this case, its injury was known only when it knew what it had to do to eliminate the hazard.

Mercer's argument is based on *Anderson v. Sybron Corp.*, 165 Ga. App. 566, 299 S.E.2d 160, aff'd, 251 Ga. 595, 310 S.E.2d 232 (1983). In *Sybron,* over a period of several years, the plaintiffs had been suffering from a variety of ailments which they knew, or reasonably should have known, were caused by exposure to a particular chemical. Id. at 566-67. The plaintiff were not suing based on those injuries, however, as their suit were based on the cataracts they had the evidence in the record did not indicate that the plaintiffs knew that they had cataracts they had each developed more recently. Id. at 567. The court noted that the evidence in the record did not indicate that the plaintiff knew that they had cataracts until within two years of filing suit and reversed the trial court's granting of summary judgment based on the bar of the statute of limitations. Id. at 567-68. The court reasoned as follows:

> The occurrence of "an injury" means the discovery of the particular injury for which the action is brought. The fact that "an" injury occurs and the casual connection is discovered does not cause the statute of limitations to run against different injuries yet unsustained, or with reasonable diligence yet undiscovered, and not yet causally connected.

Id.

Mercer's reliance on *Sybron* is well placed. The particular injury for which Mercer is suing is damage caused by the necessity of removing the defendants' products. The statute of limitations did not begin to run, accordingly, until Mercer knew, *or reasonably should have known*, that removal of the defendants' products was necessary to alleviate the hazard.

In their reply brief, defendants argue that such reasoning would allow plaintiff in property damage cases to prevent the statute of limitations from beginning to run by continuing to look into the circumstances giving rise to the claim and by putting off into the circumstances giving rise to the claim and by putting off any repairs to the damaged property. This argument does not

accurately represent Mercer's position. Mercer contends only that the statute did not begin to run until it knew, *or reasonably should have known,* the particular injury for which it brought suit. Continuing to investigate when not reasonably warranted the by the situation will not prevent the statute of limitations from beginning to run.

The record is unclear on whether Mercer knew,or reasonably should have known, that actual removal of the defendants' products was necessary prior to April 9, 1981. Genuine issues of material fact remain for trial; consequently, defendants' motion for summary judgment based on the statute of limitations is DENIED with respect to the negligence count.

II. Nuisance

Mercer has alleged that the presence of the defendants' products in its building constituted a continuing nuisance and that it is entitled to recover in damages its cost of abating that nuisance. Mercer has not alleged, however, that the defendants had a legal right to go into Mercer's building and remove their products, Despite Mercer's argument to the contrary, if a legal right to abate the nuisance does not satisfy that requirement.

For the proposition that a legal right to abate the nuisance is not a necessary element of a continuing nuisance claim in Georgia, Mercer cites *Davey v. Turner,* 55 Ga. App. 786, 191 S.E.2d 382 (1937), and *Bodin v. Gill*, 216 Ga. 467, 117 S.E.2d 325 (1960). In *Davey*, the Georgia Court of Appeals held that a nuisance claim could be sustained against the defendant who had improperly installed a heater in a home. 55 Ga. App. at 788. The court did not discuss the fact that Davey had no right to go into the house and fix the heater.

In *Bodin*, the plaintiff sued the architects of a church whose design allegedly caused an increase flow of surface water to be discharged onto the plaintiff's property. 216 gA. AT 468. the Georgia Supreme Court held that the architects could not be enjoined from the maintenance of a continuing nuisance, reasoning that "the principle upon which one is charged as a continuing wrongdoer, and therefore subject to be enjoined from the maintenance if a continuing nuisance or trespass, is that he has a legal

right and is under a legal duty to terminate the cause of the injury." Id. at 474. Earlier in the opinion, the Court mentioned that the architects could be liable for some of the relief sought. Id at 472. Because the only cause of action the decision mentions is nuisance, Mercer contends that the Court authorized liability against the architects in nuisance for damages. Consequently, Mercer argues that it is not necessary in a nuisance claim for damages that the defendant have the legal right to abate the nuisance.

This Court disagrees with Mercer's interpretation of *Bodin*. That Court's statement that the architect could be liable for some of the relief sought was immediately preceded by a discussion of *negligence* not nuisance principles; *Id.* In addition, other courts have interpreted the case to hold that a judgment be rendered against the architects on a negligence theory. *North American Company for Life and Health Insurance v. Berger*, 648 F.2d 305, 307(5th Cir.), cert. denied, 454 U.S. 1084(1981); *R.H. Macy & Co., Inc v. Williams Tile & Terrazzo Company, Inc.*, 585 F.Supp. 175, 178(N.D. Ga. 1984). Further, this Court interprets the above-quoted language in Bodin, and similar language in other cases, *City Council of Augusta v. Lombard*, 101 Ga 724, 727, 28 S.E.994 (1897); *Keener v. Addis*, 61 Ga. App. 40, 43, 5 S.E.2d 695 (1939), to mean that a legal right to abate the nuisance is an element of a continuing nuisance claim in Georgia, regardless of whether the relief desired is an injunction or damages.

Additional support for this conclusion can be found in the decisions of other jurisdictions which have considered nuisance claims in the context of asbestos-related property damage cases. In no such case of which this Court is aware has the plaintiff proceeded to trial on a nuisance claim. In *Town of Hooksett, supra*, the Court dismissed the nuisance claim, reasoning as follows:

> The creator of a nuisance is responsible in his capacity as a property owner if a nuisance arises from the use of his property in an unreasonable manner. But, in the instant case, Plaintiff seeks to recover from Defendant not in his capacity as a property owner, but in his capacity as a manufacturer. Furthermore, the Defendant's ability to abate or relieve the complaint of nuisance, a

> hallmark of the cases listed in New Hampshire, are absent in the case at bar.

617 F.Supp. at 133. Similarly, the court in *County of Johnson, Tenn. v. United States Gypsum Co.*, 580 F.Supp. 284 (E.D. Tenn. 1984), dismissed the nuisance claim, giving the following explanation:

> In all of [the nuisance cases cited by the parties], the one charged with maintaining the nuisance was in control of the property or instrumentality from or by which the nuisance was created at the time of the nuisance complained of. The "nuisance" creating property in this case was in the possession and control of the plaintiff from the time it purchased the asbestos containing products. Even if the defendants had decided to "abate" the asbestos problem themselves by repairing and replacing the plaster products they could not have forced those repairs or replacements onto the plaintiff since they no longer owned or controlled the products. Moreover, allowing the plaintiff to bring this action under a nuisance theory would convert almost every products liability action into a nuisance claim. The [Court] can only conclude that as an elementary principle of tort law, a nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality.

580 F.Supp. at 294.

Mercer's inability to allege that the defendants had a legal right to abate the nuisance is fatal to its nuisance claim. Accordingly, Mercer's nuisance count is DISMISSED from the complaint.

III. Trespass

Mercer has alleged that the release of asbestos fibers from the defendants' products within its buildings constituted a continuing trespass. As in its nuisance count, Mercer contends that it had the option of eliminating the trespass and suing for damages. Also, as in its nuisance count, Mercer has not alleged that the defendants had a legal right to alleviate the trespass.

The defendants have correctly pointed out that, in a case like the one at bar, continuing nuisance and continuing trespass are

virtually indistinguishable. Defs' Brief on Count II-VII, at 10, *citing Brand v. Montega Corp.*, 233 Ga. 32, 33, 209 S.E.2d 581 (1974). Consequently, if a legal right to abate is required to state a claim for continuing nuisance, then it is also a necessary element of a continuing trespass claim. As the Court held earlier in this Order, the legal right to abate *is* an element of a cause of action for continuing nuisance, regardless of the relief sought. Thus, it is also an element of a continuing trespass claim for damages.

The Court also notes that it has located only one other asbestos-related property damage case in which the plaintiff alleged a continuing trespass count. In that case, the court dismissed the trespass count from the complaint. *Town of Hooksett, supra* at 133.

Mercer has not, and cannot, allege that the defendants had a legal right to abate the alleged trespass. Since that allegation is necessary to state a claim for relief on a continuing trespass theory, Mercer's trespass count is DISMISSED from the complaint.

IV. Fraud

A. Summary Judgment/Dismissal

Mercer contends that the defendants committed fraud when they sold their products for use in Mercer's buildings. Mercer has alleged each element of fraud, as set out by this Court in *Starling v. Seaboard Coast Line R.R. Co.*, 533 F.Supp. 183, 192 (S.D.Ga. 1982). Therefore, the defendants' motion to dismiss the fraud count must fail.

In their alternative motion for summary judgment, the defendants rely on several pleadings supposedly on file in this case. The Court was not able to locate on the docket sheet for this case, however, the pleading that the defendants refer to as "Plaintiff's Responses to Defendants' Interrogatories, response nos. 10, 15, 16, 17." The Court did locate "Plaintiff's Answers to Defendants' First Interrogatories filed on Behalf of All Defendants," filed on December 20, 1985, and "Plaintiff's Supplemental Response to Defendants' Second Set of Interrogatories," filed on January 2, 1986. Neither of these pleadings has any bearing on the fraud count. It is apparently "Plaintiff's Responses to Defendants'

Second Set of Interrogatories" to which defendants refer but, after a thorough search, the Court can only conclude that that pleading is not on file in this case.

The other evidentiary material cited by the defendants does not establish that any of the defendants is entitled to summary judgment on the fraud count. That material merely establishes that there has been no direct contact between particular defendants and Mercer. In Georgia, a plaintiff may recover in fraud from a defendant with whom he has not directly dealt. *Hubacher v. Volkswagen Central*, 164 Ga. App. 791, 793, 298 S.E.2d 533 (1982). Accordingly, defendants' motion for summary judgment on the fraud count cannot be granted.

B. Statute of Limitations

The four-year property damage statute of limitations applies in property damage actions sounding in fraud. *See Owen v. Mobley Construction Co., Inc.*, 171 Ga. App. 462, 462-63, 320 S.E.2d 255 (1984). On such claims, however, the statute is tolled "until the fraud is discovered or by reasonable diligence should have been discovered." *Shipman v. Horizon Corp.*, 245 Ga. 808, 267 S.E.3d 244 (1980). The defendants contend that the statute of limitations began to run on Mercer's fraud count once Mercer had learned that asbestos was present in its buildings and that its presence there might be hazardous.

In support of their motion, the defendants rely on several cases which they characterize as analogous to the case at bar. One of those cases is *Owen v. Mobley Construction Co., Inc., supra.* There, the plaintiff brought a fraud claim arising out of an improper roofing job. The court held that the claim was barred by the statute of limitations because the roof had begun to leak more than four years before the plaintiff filed suit. *Id.* at 463. In *Gerald v. Doran*, 169 Ga. App. 22, 311 S.E.2d 225 (1983), another of the cases on which the defendants rely, the plaintiffs brought a fraud claim based on the defendants' alleged representation that the house he sold them was connected to the public sewer lines, when in fact it was not. In 1977, the plaintiffs began to experience plumbing problems and learned that the lines were not directly connected. *Id.* The court held that the statute of limitations started to run at

that time. *Id.* at 23. The defendants also cited *Webb v. Lewis*, 133 Ga. App. 18, 209 S.E.2d 712 (1974). Like *Doran, Webb* involved a fraud claim arising out of the purchase of a house. The court held that the statute of limitations began to run when the plaintiff learned that the house she had bought was located on a landfill that formerly had been the city garbage dump. *Id.* at 19-20. The analogy between these cases and the case at bar is not apparent to this Court.

The statute of limitations began to run when Mercer discovered, or reasonably should have discovered, "the fraud." There is no evidence in the record that indicates that Mercer believed, prior to April 9, 1981, that the defendants had intentionally misrepresented the safety of their products. Whether Mercer *should* have discovered "the fraud" prior to April 9, 1981, is a question for the jury. Defendants' motion for summary judgment based on the statute of limitations is DENIED with respect to the fraud count.

V. Restitution

In support of its restitution claim, Mercer cites § § 1, 114 and 115 of the *Restatement of Resolution* (1937) ("Reinstatement"). Georgia has recognized and applied the unjust enrichment principle embodied in § 1 of the Restatement, but it has applied it only in breach of contract actions. *See Claxton v. Small Business Administration*, 525 F.Supp. 777, 782 n.1 (S.D.Ga. 1981); *PMS Construction Co., Inc v. DeKalb County*, 243 Ga. 870, 872, 257 S.E.2d 285, *on remand*, 151 Ga. App. 63, 258 S.E.2d 730 (1979). Mercer does not contend that any of the defendants breached a contract.

Neither Restatement § 114 nor § 115 has ever been cited, let alone adopted, in any reported Georgia decision. Even assuming that the Georgia courts would adopt either of these sections, both provide only that a person is entitled to restitution under certain circumstances if the services performed on behalf of the defendant were *immediately necessary*. The cases basing recovery on these sections illustrate what is meant by "immediately necessary."

In *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830, 830, 834-5 (2d Cir.), *cert.denied*, 434 U.S. 859 (1977), the United States Court of Appeals for the Second Circuit held that the owner of a ship with medical facilities was

entitled to recover the cost of the additional fuel used when it changed course to aid a seriously ill seaman on a ship without medical facilities. The Second Circuit has also held that the Atomic Energy Commission could recover under these sections for making electric power available to a utility company during a power shortage. *United States v. Consolidated Edison of New York*, 580 F.2d 1122, 1126-30 (2d Cir. 1978). Finally, a court has held that a township was entitled to recover the cost of making repairs to a privately owned dam that posed an immediate threat to its residents. *Brandon Township v. Jerome Builders, Inc.*, 80 Mich. App. 180, 263 N.W.2d 326 (1977).

In 1980, Mercer first learned that asbestos was present in its buildings. *Eg.*, Ex. 9 to Defs Statute Brief. It is now over five years later, and Mercer has yet to complete the removal of all of the asbestos. *See* Mercer's Omnibus Brief at 1-2. Moreover, Mercer did not consider it necessary to begin removal of the asbestos immediately. In the fall of 1980, Mercer declined to have an asbestos removal contractor begin abatement of the asbestos. Ex. 11 to Defs' Statute Brief, at 46, 51. It was not until approximately one year after Mercer learned that asbestos was present in its buildings that Mercer actually began to remove it. *See* Ex. 23 to Mercer's Omnibus Brief, at 117. Under these undisputed facts, Mercer would not be entitled to recover under § § 114 and 115 of the Restatement, even assuming Georgia would allow recovery based on those sections, because it did not consider the removal of the defendants' products to be immediately necessary. Defendants' motion for summary judgment on the restitution count is GRANTED.

VI. CERCLA

Mercer has alleged that the defendants are liable for a violation of § 9607 (a)(3) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C §§ 9601 *et seq.* (1982) ("CERCLA"). Congress designed CERCLA to deal with the problem of inactive and abandoned hazardous waste disposal sites. *Bulk Distribution Centers, Inc. v. Monsanto Co.*, 589 F.Supp. 1437, 1441 (S.D.Fla. 1984); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F.Supp. 823, 838 (W.D.Mo. 1984); U.S.

Code Cong. & Admin. News 1980, at 6119 and 6125. Thus, at first glance, it appears that the problem of the release of asbestos fibers within buildings currently being used would not be subject to redress under the Act. Further, subsequent to its enactment, Congress confirmed that it did not intend CERCLA to apply to situations like the one presented by Mercer's complaint.

On September 26, 1985, the Senate passed bill S.51, which reauthorized and amends CERCLA. Section 112 of that bill clarifies the scope of CERCLA by providing as follows:

> The President shall not provide for a removal or remedial action under this section in response to a release or a threat of release...from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures...

In the Senate Report on S.51, the Committee on Environment and Public Works explained the purpose of the amendment:

> CERCLA response authorities are extremely broad, but there are nevertheless situations, some of which may be life-threatening, which are not within the law's scope. The Agency has encountered some difficulties, primarily political, in restraining CERCLA responses to the scope of the law. For this reason, S.51 proposes to make more explicit certain areas which the law does not cover...
>
> The Environmental Protection Agency has received requests to take removal or remedial action in *situations where the contamination was from building materials used in the structure and was creating an indoor hazard. This section would clarify that such situations are not subject to remedial or removal action.*

S.Rep. No. 11, 99th Cong., 1st Sess. (1985) at 16-17 (emphasis added). In § 117 of the bill that the House adopted on December 10, 1985, H.R. 2817, it likewise clarified that CERCLA does not apply to products which are part of the structure of a building. *See also* H.R.Rep. 253, 99th Cong., 1st Sess. (1985) at 91. The view of both Houses of Congress, that CERCLA was never intended to

apply in a case like the one at bar, is entitled to great weight. *N.L.R.B. v Bell Aerospace Co.*, 416 U.S. 267, 275, 40 L.Ed.2d 134, 143 (1974).

Mercer has not come forward with any reason for this Court to find that the Congress that enacted CERCLA intended it to mean something different from what the current Congress believes it meant. Nor has Mercer explained why the purposes of a statute aimed at abandoned hazardous waste dumps would be advanced through application of the statute here. Instead, Mercer has expended a considerable amount of effort in contending that it can arguably establish each of the elements of liability under 42 U.S.C. § 9607 (a) (3).

To be liable under § 9607 (a)(3), the defendant must be a "person" who "disposed of" a "hazardous substance" at a "facility" from which there has been a "release" or a "threatened release." 42 U.S.C. § 9607 (a)(3) (1984). For the facts alleged in Mercer's complaint to state a claim for relief under this section would require too strained an interpretation of the statutory definitions of these terms. Since it is clear that CERCLA was never intended to apply to the facts of this case, the Court declines to interpret § 9607 (a)(3) in the manner sought by Mercer. Accordingly, Mercer's complaint fails to state a claim for relief under CERCLA, and that count is DISMISSED.

CONCLUSION

The defendants' motion for summary judgment or, in the alternative, to dismiss Counts II-VI of the complaint is GRANTED IN PART and DENIED IN PART. It is GRANTED to the extent that the nuisance, fraud and CERCLA counts are dismissed from the complaint. It is also GRANTED to the extent that the defendants are granted summary judgment on the restitution count. The motion is DENIED on the negligence and fraud counts. Defendants' motion for summary judgment on the restitution count. The motion is DENIED on the negligence and fraud counts. Defendants' motion for summary judgment based on the statute of limitations is DENIED on the negligence and fraud counts, and it is DISMISSED AS MOOT as to the remainder of

the complaint. Ther Clerk is directed to enter an appropriate judgment.

SO ORDERED, this 9th day of March, 1986.

CHIEF JUDGE, UNITED
STATES DISTRICT COURT
SOUTHERN DISTRICT OF
GEORGIA,
Sitting by Designation

Appendix H

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF
GEORGIA MACON DIVISION

No. 85-126-3-MAC

THE CORPORATION OF MERCER UNIVERSITY,
Plaintiff

v.

NATIONAL GYPSUM COMPANY, et al.,
Defendants

ORDER

At the pretrial conference, the Court granted the defendants' motion to bifurcate the trial of the above-styled action. The court held a two-day trial on the statute of limitation issues on March 10 and 11, 1986. That trial was to be followed by a trial on the merits of Mercer's negligence and fraud claims, provided the jury found against the limitation bar.

In the statute of limitation trial, the Court submitted to the jury a Special Verdict consisting of four factual questions *potentially* bearing on the statute of limitation issues. Presently before the Court are the motions of the parties concerning the jury's answers to the Special Verdict questions. National Gypsum Company, United States Gypsum Company and W.R. Grace & Company have filed a post-trial motion for final judgment or, alternatively, for certification pursuant to 28 U.S.C. § 1292. Owens-Illinois, Inc., and Owens-Corning Fiberglas Corporation have moved for judgment on the verdict. Finally, Mercer has moved to disregard the jury's answers to certain interrogatories, for judgment not withstanding the verdict or in the alternative, for a new trial. The Court heard argument on the motions on March 18, 1986.

BACKGROUND

Mercer filed this lawsuit on April 9, 1985. Since that time, the statute of limitation issue has been fiercely contested. It sparked numerous discovery disputes, was discussed in no less than seven briefs and was argued before the Court *ad nauseum.*

The defendants' motion for summary judgment based on the statute of limitation presented the Court with the task of applying the Georgia discovery rules on negligence and fraud claims to a case unlike any case to which those rules had ever before been applied. The Court was far from certain about how the Georgia courts would apply the legal principles involved to the facts of this case. For the purpose of summary judgment, therefore, the Court interpreted the discovery rules expansively and denied the defendants' motion. This allowed the Court more time to reflect on how the statute of limitation applied here, while the case proceeded to trial on the statute of limitation issues. By submitting to the jury the factual questions the Court deemed relevant to both the plaintiff's and the defendant's views on the discovery rules, the court now has before it all of the factual determinations necessary to decide the statute of limitation issues under either side's view of the law.

A. Negligence

The statute of limitation for property damage actions is four years from the time that the right of action accrues. O.C.G.A. § 9-3-30 (1982). In its decision on the defendants' motion for summary judgment, the Court held that the discovery rule applies to Mercer's negligence claim. Order of March 9, 1986, at 8. The discovery rule for negligence is that the statute of limitation does not begin to run until the plaintiff discovers, or reasonably should have discovered, the particular injury for which relief is sought and the causal connection between that injury and the defendant's conduct. *Eg., Lumbermen's Mutual Casualty Co. v. Pattillo Construction Co.*, 254 Ga. 461, 463, 330 S.E.2d 344 (1985).

Mercer maintains that the particular injury for which it is suing is the damage to its buildings occasioned by the fact that it had to remove the defendants' products to eliminate the hazard those products allegedly presented. The defendants, on the other hand,

contend that Mercer's injury is the presence of the asbestos-containing materials, coupled with the knowledge that those products are alleged to be hazardous.

In its Order of March 9, this Court relied on *Sybron v. Anderson Corp.* 165 Ga. App. 566, 299 S.E.2d 160, *aff'd,* 251 Ga. 593, 310 S.E.2d 232 (1983), in holding that Mercer's injury was the damage caused by the necessity of removing the defendants' products. On further reflection, however, the Court does not believe that the *Sybron* analysis applies in the instant case.

In *Sybron*, the plaintiffs brought suit for having developed cataracts. *Id.* For several years, the plaintiffs had been suffering from other ailments, which they knew, or reasonably should have known, were caused by the defendant's conduct. *Id.* The court held that the discovery rule applies to the *particular* injury for which the action is brought, *id.* at 567-68, that is, knowledge that the cataracts were caused by defendant's products.

The *Sybron* analysis would apply here only if Mercer had suffered one injury when it discovered the presence of the defendants' products and a different injury when it learned that it would be necessary to remove the defendants' products. Leaving aside for the moment whether Mercer's injury was on a building-by-building basis, Mercer suffered only one "injury" to each building. That injury was ascertainable when Mercer knew that allegedly hazardous asbestos-containing products were present in its buildings. At that time, Mercer could have recovered against the defendants for whatever damage it would incur in dealing with the defendants' products. When Mercer learned that it would be necessary to remove the defendants' products, it did not suffer a new injury, although it may have learned at that time that its injury would be greater than it had first thought.

The second prong of the discovery rule is causal connection. Under this Court's view of the law, that second prong is not genuinely at issue in this case.

The causal connection required to start the statute of limitation clock running, in basic terms, is merely knowing what is causing the injury. *Sybron*, 165 Ga. app. at 567; *King v. Seitzingers, Inc.*, 160 Ga. App. 318, 387 S.E.2d 252 (1981). For example, in *King,* the

plaintiff was suffering from lead-poisoning. Initially, his doctor had informed him that his condition was caused by his work on iron covered with lead paint. *Id.* Later, the doctor determined that the lead-poisoning was actually caused by the plaintiff's work on a smokestack through which fumes containing lead were emitted. *Id.* The court held that the statute of limitation did not begin to run until the plaintiff knew, or reasonably should have known, the actual cause of his lead-poisoning. *Id.* at 320.

Here, Mercer is suffering from asbestos contamination. Before Mercer had confirmed the presence of asbestos in even one of its buildings, it knew that, if asbestos were present, it was present because it had been incorporated into the defendants' products which had been placed in its buildings. Def's Brief on Statute of Limitation, Ex. 4 at 34-35; Ex. 7 at 47, 70-71.

It follows, then, that only two factual determinations are necessary to decide when Mercer's negligence right of action accrued. They are: (1) when did Mercer discover, or reasonably should have discovered, that the use of asbestos-containing materials in buildings was allegedly hazardous; and (2) when did Mercer discover, or reasonably should have discovered, the presence of asbestos-containing products in its buildings?

B. Fraud

The four-year property damage statute of limitation also applies to Mercer's fraud claim. *See Owen v. Mobley Construction Co.,Inc., 1*71 Ga. App. 462, 462-63 320 S.E.2d 255 (1984). In Georgia, the statute of limitation begins to run on a fraud claim when "the fraud is discovered or by reasonable diligence should have been discovered." *Shipman v. Horizon Corp.,* 245 Ga. 808, 267 S.E.2d 244 (1980). Of course, the plaintiff must also be injured before the statute of limitation begins to run, because the plaintiff cannot successfully maintain an action until he is injured.

The questions that the Court has been grappling with are : Does the statute of limitation start to run on a fraud claim when the plaintiff discovers, or reasonably should have discovered, he is injured by defendant's false representations? Or, does the statute begin to run only when plaintiff first discovers, or reasonably should have discovered, defendant's *scienter* of the false representations?

No Georgia decision, nor any decision that the Court was able to locate, explicitly addresses this issue. The Georgia cases do appear to support the defendants' position, in that they seem to hold that the statute begins to run when the plaintiff learns that the representation is untrue. Most of the cases cited by the defendants involved situations where the plaintiff would reasonably be expected to suspect that the defendant's misrepresentation was intentional as soon as he learned that it was false. Although none of the cases involved situations where it seems that a reasonable person would not ordinarily think, on learning that a representation was false, that he that he had been the victim of fraud, as opposed to negligence. Such a case is *Sears, Roebuck & Co. v. Green,* 142 Ga. App. 770, 237 S.E.2d 10 (1977). There, the plaintiff alleged fraud arising out of the installation of a roof and gutters. Id. In reversing the trial court's denial of the defendant's motion for summary judgment, the court reasoned as follows:

> The claim of fraud is that the defendant represented that it would install the roof and gutters in a workmanlike manner and that it did not. In answer to an interrogatory plaintiff admitted learning that the roof leaked shortly after its installation in 1963. This shows knowledge that the work was not performed in a workmanlike manner. The statute thus began to run at least after the acquiring of this knowledge.

Id. at 771 (citation omitted). Similarly, in *Owen,* the plaintiff alleged fraud arising out of an improper roofing job. 171 Ga. App. at 462. The court held that the statute of limitation began to run when the roof began to leak. Id. at 463. These cases are significant because they involve typical negligence situations where fraud is not usually involved. Yet, the courts held that the knowledge that the representation that is the subject of the fraud claim was false is all that is necessary to start the statute of limitation running. Thus, it appears that knowledge of "the fraud" is merely knowledge that the representation was false, not that it was *intentionally* false.

As noted earlier, in addition to discovering the fraud, the plaintiff must be injured before the statute of limitation starts to run. This raises the question, for the purpose of the fraud statute of limitation issue, whether when Mercer was injured should be

measured by when the asbestos-containing materials had been placed in its buildings.

In *Lumbermen's, supra,* the Georgia Supreme Court held that the statute of limitation did not start to run until the plaintiff discovered, or reasonably should have discovered, that he had sustained an injury. That decision represented a substantial change in the law of Georgia. *See U-Haul Co. of Western Georgia v. Abreu & Robeson, Inc.,* 247 Ga. 565, 277 S.E.2d 497 (1931); *Millard Mathew Builders, Inc. v. Plant Improvement Co., Inc.,* 167 Ga. App. 855, 307 S.E.2d 739 (1983); *Wellston Co. v. Sam N. Hodges, Jr., & Co.,* 114 Ga. App. 424, 151 S.E.2d 481 (1966). Although the right of action in *Lumbermen's* was not fraud, the case is indicative of the trend in Georgia and elsewhere not to start the statute of limitation running until the plaintiff discovers, or reasonably should have discovered, his injury. This Court believes that the Georgia Supreme Court would continue that trend and apply the discovery rule to determine when Mercer suffered its injury on the fraud count.

The factual determinations necessary to decide when Mercer's fraud right of action accrued, consequently, are the same as for the negligence claim: When did Mercer learn, or reasonably should have learned, that the use of asbestos-containing materials in buildings was allegedly hazardous; and when did Mercer learn, or reasonably should have learned, that those products were present in its building?

Special Verdict

The Court submitted the following four questions to the jury by way of a form of Special Verdict:

1. Do you find, based on a preponderance of the evidence, that the plaintiff knew, or reasonably should have known, on or before April 8, 1981, of the alleged hazard of the use of asbestos-containing products in public buildings?

2. Do you find, based on a preponderance of the evidence, that the plaintiff k- ew, or reasonably should have known, that the asbestos-containing products at issue in this case were present [on a building-by-building basis]?

3. Do you find, based on a preponderance of the evidence, that the plaintiff knew, or reasonably should have known, on or before April 8, 1981, that the ... defendants were aware, at the time the asbestos-containing products were sold to Mercer, that those products were hazardous [on a defendant-by-defendant basis]?

Based on the foregoing discussion of the legal aspects of the statute of limitation, only the first two questions deal with facts relevant to whether Mercer's negligence and fraud claims are barred by the statute of limitation.

The jury answered the second question in the affirmative on 12 of the 16 buildings involved in the suit. The statute has run, consequently, on at least 12 of the 16 buildings. The defendants contend that a building-by-building determination on Question 2 was unnecessary and that, based on the jury's affirmative answers as to 12 of the 16 buildings, the statute of limitation has run on all o the buildings at issue.

The defendants argue that a building-by-building determination was not necessary on two grounds. First, they argue that knowledge of the presences of asbestos in more than a substantial number of the buildings goes merely to the extent of injury. Secondly, they maintain that, since Mercer brought only one negligence and one fraud count in its complaint to recover for the damages to all of its buildings, the jury's finding that the statute of limitation has run on 75% of the buildings means that the statute has run on Mercer's entire negligence and fraud rights of action.

The presence of asbestos in each of Mercer's buildings does not go merely to the extent of the injury, because the buildings were built at different times over a nearly 20-year period, and the materials for use in the buildings were purchased through different transactions over that 20-year period. To recover against a defendant whose building materials were used in a building built in 1962, Mercer would have to prove that the defendant was negligent in 1962, even if Mercer had already established that the same defendant was negligent with respect to the asbestos-containing materials in a building constructed in 1972.

The defendants' second argument seeks to have the Court lump together all of Mercer's contaminated buildings for the pur-

pose of analyzing the statute of limitation issues on the ground that Mercer alleged only one fraud and one negligence count. The Federal Rules of Civil Procedure, however, only require notice pleading, and are to be interpreted to reach the merits of a controversy and to do substantial justice. Fed.R.Civ.P. 1, 8. *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 995 (11th Cir. 1983); *Markham v. Holt*, 369 F.2d 940, 943 (5th Cir. 1966). In light of the liberal pleading requirements for the Rules, the defendants' argument is too restrictive.

The defendants have been on notice since Mercer filed its complaint that Mercer was seeking damages for a number of buildings on its campuses. To accept the defendants' argument would be particularly unfair since it is the *defendants* who have been arguing for "building specificity" throughout this litigation. The defendants have steadfastedly maintained that the issues of damages and exposure are building specific. And, because the buildings were built over a nearly 20-year period, the defendants' position, that to be liable they must have been negligent when the products were sold, inescapably leads to the conclusion that even negligence is building specific. Given the defendants' building specific approach to this case, it would not be just now to accept their about-face argument that Mercer's buildings should be lumped together in considering the statute of limitation issues.

Mercer's Motion Concerning the Special Verdict

Mercer has moved for judgment notwithstanding the verdict or, alternatively, a new trial on Question 4 of the Special Verdict. Since the Court has decided that Question 4 is not relevant to the statute of limitation issues, Mercer's motion is moot. Mercer also requested that the Court disregard the jury's answers to Questions 2 and 3 on the Pharmacy building, but Mercer withdrew that request at oral argument on its motion. Transcript of Hearing of March 18, 1986, at 45.

CONCLUSION

The statute of limitation expired before Mercer filed its negligence and fraud claims for 12 of 16 of the buildings on which Mercer went to trial. The buildings on which Mercer is entitled to proceed on the merits are: Knight Hall, the Fine Arts Building, the Student Center on the Atlanta Campus and the DuVall Building. Special Verdict, Questions 1 and 2.

The post-trial motion by United States Gypsum Company, National Gypsum Company and W.R. Grace & Company for final judgment or, alternatively, for certification pursuant to 28 U.S.C. § 1292 is GRANTED IN PART and DENIED IN PART. Judgment is GRANTED in favor of United States Gypsum Company, as Mercer does not contend that its products are in any of the four buildings still at issue. It is DENIED as to National Gypsum Company and W.R. Grace & Company. The motion by Owens-Illinois, Inc., and Owens-Corning Fiberglas Corporation for judgment on the verdict is DENIED. Mercer's motion for the Court to disregard the jury's answers to certain interrogatories, for judgment notwithstanding the verdict or, in the alternative, a new trial is DISMISSED AS MOOT. The Clerk of Court is directed to enter judgment for United States Gypsum Company. Trial of the remaining case shall resume as scheduled at 9:00 a.m., Monday, March 31, 1986.

SO ORDERED, this 24th day of March, 1986.

CHIEF JUDGE, UNITED
STATES DISTRICT COURT
SOUTHERN DISTRICT OF
GEORGIA,
Sitting by Designator

Appendix I

OFFICIAL CODE OF GEORGIA ANNOTATED

1989 Cumulative Supplement

Including Acts of the 1989 Session of the General Assembly

Prepared by

The Code Revision Commission
The Office of Legislative Counsel and
The Editorial Staff of the Michie Company
Published Under Authority of the State of Georgia

Volume 39

Title 51. Torts

Including Notes to the Georgia Reports Through Volume 258 page 777, and the Georgia Appeals Reports Through Volume 188, page 902

THE MICHIE COMPANY
Law Publishers
Charlottesville, Virginia

1989

51-1-11. When privity required to support action; product liability action and time limitation therefore.

(a) Except as otherwise provided in this Code section, no privity is necessary to support a tort action; but, if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract and except as provided in Code Section 11-2-318.

(b) (l) The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

(2) No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the inJury.

(3) A manufacturer may not exclude or limit the operation of this subsection.51-1-11

(c) The limitation of paragraph (2) of subsection (b) of this Code section regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability, except an action seeking to recover from a manufacturer for injuries or damages arising out of the negligence of such manufacturer in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property. Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer. (Orig. Code 1863, § 2899; Code 1868, § 2905; Code 1873, § 2956; Code 1882, § 2956; Civil Code 1895, § 3812; Civil Code 1910, § 4408; Code 1933, § 105-106; Ga. L. 1968, p. 1166, § 1; Ga. L. 1978, p. 2202, § 1; Ga. L. 1978, p. 2218, § 1; Ga. L. 1978, p. 2267, § 1; Ga. L. 1987, p. 613, § 1.)

HOUSE SUBSTITUTE TO SENATE BILL 649

A BILL TO BE ENTITLED AN ACT

To amend Article 2 of chapter 3 of Title 9 of the Official Code of Georgia Annotated, relating to specific periods of limitations of actions, so as to provide that certain asbestos actions shall be revived; to provide for the extension of the applicable limitation of actions for certain asbestos actions; to provide for statutory construction; to except certain asbestos actions from the limitation; to provide for applicability; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Article 2 of Chapter 3 of Title 9 of the Official Code of Georgia Annotated, relating to specific periods of limitations of actions, is amended by inserting immediately following Code Section 9-3-30 a new Code section to read as follows:

"9-3-30.1. (a) Notwithstanding the provisions of Code 9-3-30 or any other law, every action against a manufacturer or supplier of asbestos or material containing asbestos brought by or on behalf of any person or entity, public or private; or brought by or on behalf of this state or any agency, department, political subdivision, authority, board, district, or commission of the state; or brought by or on behalf of any municipality, county, or any state or local school board or local school district to recover for:

(1) Removal of asbestos or materials containing asbestos from any building owned or used by such entity;

(2) Other measures taken to correct or ameliorate any problem related to asbestos in such building;

(3) Reimbursement for such removal, correction, or amelioration related to asbestos in such building; or

(4) Any other claim for damage to real property allowed by law relating to asbestos in such building

which might otherwise be barred prior to July 1, 1990, as a result of expiration of the applicable period of limitation, is revived

or extended. Any action thereon shall be commenced no later than July 1, 1990.

(b) The enactment of this Code section shall not be construed to imply that any action against a manufacturer or supplier of asbestos or material containing asbestos is now barred by an existing limitations period.

(c) Nothing in this Code section shall be construed to revive, extend, change, or otherwise affect the applicable period of limitation for persons or entities not set forth and provided for in subsection (a) of this Code section.

(d) Nothing contained in this Code section shall be construed to have any effect on actions for personal injury or any other claim except as specifically provided in this Code section."

Section 2. This act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

Section 3. All laws and parts of laws in conflict with this Act are repealed.